

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF: J.B. KLINE, JR.  
LANDSCAPING AND LAWN  
MAINTENANCE, INC.**

Petitioner

Brian Kline

Curt Schreffler

William Landfair

Craig Hedberg

Ryland Mitchell

Daniel Wilhelm

For the Petitioner

Todd D. Brown, Esquire

Debra S. Borden, Esquire

Attorneys for the Petitioner

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Kevin Deutsch

In Opposition to the Petition

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Before: Martin L. Grossman, Hearing Examiner

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Board of Appeals No. S-2807  
(OZAH Case No. 11-31)

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

**TABLE OF CONTENTS**

|   | <b>Page</b> |
|---|-------------|
| I. STATEMENT OF THE CASE.....                             | 2           |
| II. FACTUAL BACKGROUND .....                              | 4           |
| A. The Subject Property and the General Neighborhood..... | 4           |
| B. Proposed Use .....                                     | 11          |
| C. The Environment .....                                  | 26          |
| D. The Master Plan.....                                   | 29          |
| E. Community Concerns .....                               | 30          |
| III. SUMMARY OF THE HEARING .....                         | 37          |
| A. Petitioner's Case.....                                 | 38          |
| IV. FINDINGS AND CONCLUSIONS .....                        | 55          |
| A. Inherent and Non-Inherent Adverse Effects.....         | 56          |
| B. General Standards.....                                 | 58          |
| C. Specific Standards: Landscape Contractor .....         | 64          |
| D. General Development Standards .....                    | 67          |
| V. RECOMMENDATIONS .....                                  | 72          |

## I. STATEMENT OF THE CASE

On April 21, 2011, Petitioner, J.B. Kline, Jr. Landscaping and Lawn Maintenance, Inc, filed a petition for a Landscape Contractor Special Exception pursuant to Zoning Ordinance §59-G-2.30.00. Petitioner seeks the special exception to continue operating an established landscaping business on a 5.77 acre site it owns at 6720 Olney-Laytonsville Road (Maryland Route 108) in Laytonsville, Maryland.<sup>1</sup> Petitioner also seeks waivers of some parking regulations. The subject site is located on Parcel P560 and Outlot B, and partially in a Special Protection Area. The site is in the R-200 and Upper Rock Creek Environmental Overlay Zones. The R-200 Zone permits landscape contractors by special exception, and the Overlay Zone's restrictions do not apply in this case because the site is not served by community sewer service.

The Board of Appeals initially scheduled a hearing in this matter for September 9, 2011, before the Hearing Examiner. Exhibit 18. At the request of the Petitioner (Exhibit 19), the hearing date was continued by the Hearing Examiner to October 7, 2011. Exhibit 20. Petitioner amended the petition on August 5, 2011 (Exhibit 21), and the amendment was noticed on August 23, 2011 (Exhibit 22). Petitioner filed its approved NRI/FSD and Forest Conservation Plan exemption on September 1, 2011. Exhibit 23.

By letter dated September 29, 2011 (Exhibit 24), the Montgomery County Planning Board advised the Hearing Examiner that it had voted unanimously on September 22, 2011, to recommend approval of the petition and to approve the Preliminary and Final Water Quality Plan for the site. The report of the Technical Staff of the Maryland-National Capital Park and Planning Commission (Exhibit 24(a)),<sup>2</sup> which recommended approval with conditions, was attached to the Planning Board letter, and that letter specified recommended conditions for the special exception that

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<sup>1</sup> The business has been operating without benefit of a special exception since 1986. Exhibit 24, p. 1. On October 29, 2010, Petitioner was cited by the Department of Permitting Services for operating without a special exception. Exhibit 11. This application followed.

<sup>2</sup> The Technical Staff Report, Exhibit 24(a), is frequently quoted and paraphrased herein.

differed in minor ways from the conditions recommended by Technical Staff. Also attached to the Planning Board letter was an errata sheet for the Technical Staff report (Exhibit 24(c)). Staff later supplemented its report with an e-mail on September 30, 2011, which further addressed the requested waivers of parking regulations. Exhibit 25. Staff stated, *inter alia*:

The applicant applied for a number of parking design standard waivers under Sec. 59-E-2.2., believing the Ordinance was ambiguous and that it could conceivably be interpreted as an additional requirement to those under 59-E-2.83. Staff reviewed these as part of the application. The Board informed the applicant that the requirements under 59-E-2.2. had not, historically, been applied to special exception uses in residential zones, and that the waivers were unnecessary.

On October 6, 2011, the day before scheduled hearing, Kevin Deutsch, an adjoining neighbor, filed a “letter of Testimony” opposing the petition. Mr. Deutsch’s submission also attached an anonymous, unsigned letter, allegedly from another neighbor. As noted by the Hearing Examiner at the hearing, anonymous letters are not accepted as evidence in this type of proceeding. Tr. 4. Mr. Deutsch’s letter was received into evidence, but cannot be characterized as “testimony” because Mr. Deutsch was not present at the hearing to be placed under oath and cross-examined.

The Hearing went forward as scheduled on October 7, 2011. There was no opposition at the hearing, but the record was held open until October 20, 2011 to give Petitioner an opportunity, by October 10, 2011, to supplement its land planner’s testimony with an affidavit addressing the compatibility of the existing sign (Exhibit 30(c)), to file a self-contained statement of operations (Exhibit 30(b)),<sup>3</sup> and to give Technical Staff and interested parties ten days for comment, until October 20, 2011. Petitioner made these filings, but no further commentary was received; however, on October 20, 2011, the Planning Board adopted a resolution approving the final language of the preliminary and final water quality plan for the site, and Technical Staff filed it with the Hearing Examiner. Exhibit 31(a). The record closed, as scheduled, on October 20, 2011.

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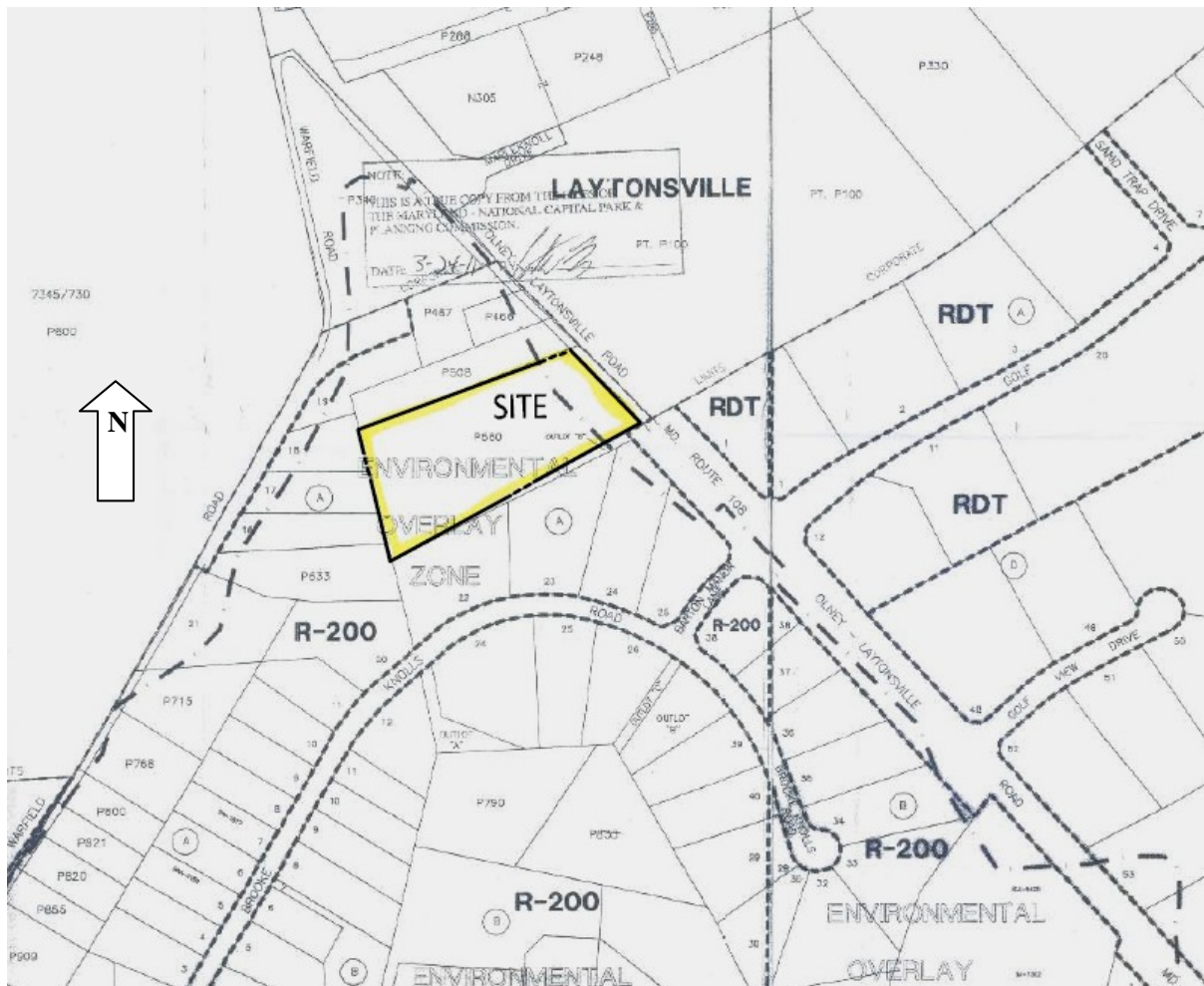
<sup>3</sup> Petitioner’s proposed operations were well described in its revised Statement in Support of its application (Exhibit 21(e), pp. 2-3); however, the Hearing Examiner asked for a self-contained statement of operations to ease enforcement by the Department of Permitting Services. Tr. 16-17.

As will appear more fully below, the opposition to this special exception is premised on adverse effects which are inherent in a landscape contractor operation. Zoning Ordinance §59-G-1.2.1, explicitly provides, “*Inherent adverse effects alone are not a sufficient basis for denial of a special exception.*” Any potential non-inherent adverse effects can be eliminated by appropriate conditions. Therefore, the Hearing Examiner concludes that this petition should be granted.

## II. FACTUAL BACKGROUND

### A. The Subject Property and the General Neighborhood

As mentioned above, the 5.77 acre subject site is located at 6720 Olney-Laytonsville Road (MD 108), adjacent to the town of Laytonsville. As can be seen from the zoning map (Exhibit 17), the property is almost trapezoidal in shape, with about 282 feet of eastern frontage on MD 108:



As the above map also shows, the property is in the R-200 and Environmental Overlay Zones, but it is across the street from the RDT Zone. The subject site is described by Technical Staff as follows (Exhibit 24(a)):

. . . The property is identified as Parcel P560 and Outlot B. The applicant's one-story brick and frame residence with a detached garage and shed is located in the southeast corner of the property fronting Olney-Laytonsville Road. This area is separated and screened from landscape operations with a privacy fence and Leyland Cypress trees. It is not part of the special exception application.

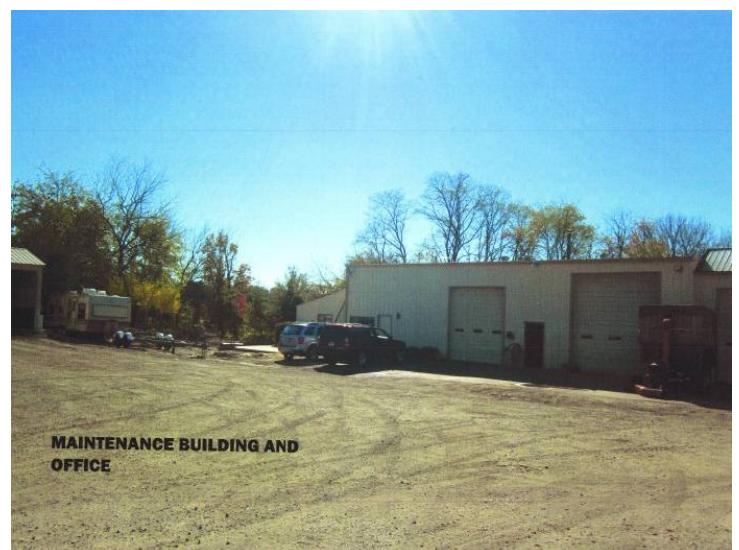
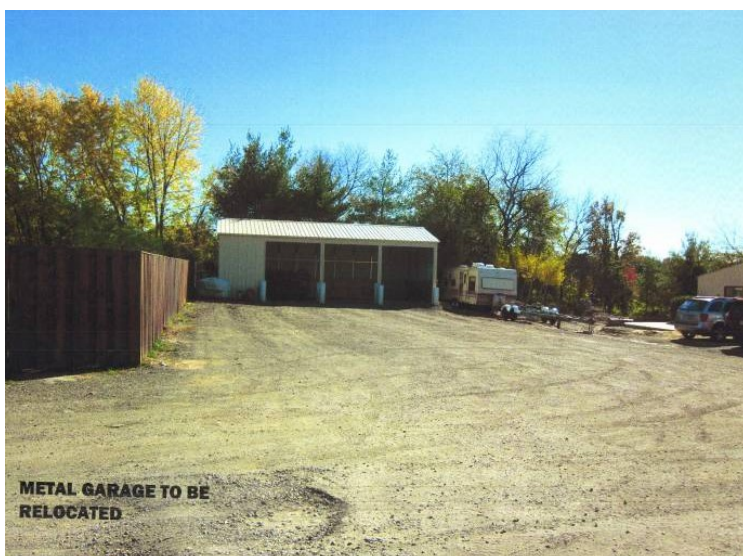
The existing landscape contractor business has been on the property since 1986. Structures consist of a metal maintenance/storage building with an attached office (the largest building on site), designated outdoor bulk material storage enclosures (soil, mulch, plants, hardscape material, firewood), storage buildings for bulk material and equipment, and dumpster areas for storage of yard trimmings. The site is substantially screened with a mixture of deciduous and evergreen trees, creating a buffer between the property, the neighbors, and the road.

An aerial photo of the existing site is shown below (Exhibit 24(a), p.3), and it is followed by a series of ground level photos of the site provided by Petitioner (Exhibit 8):

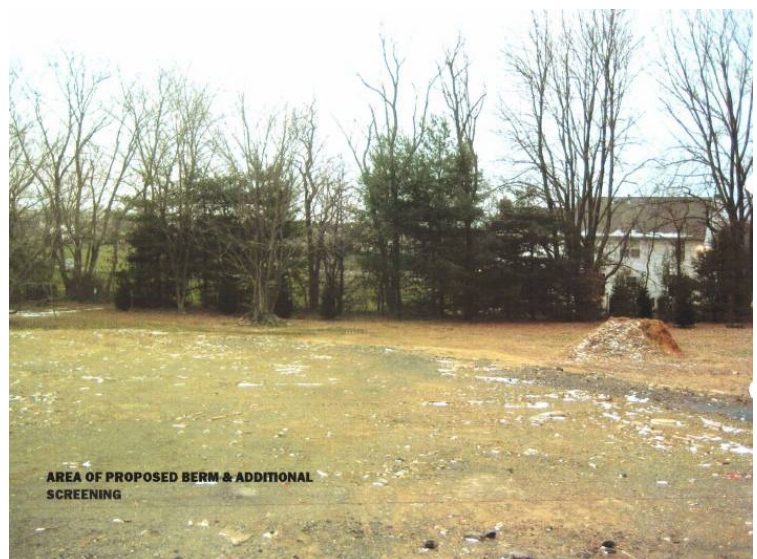
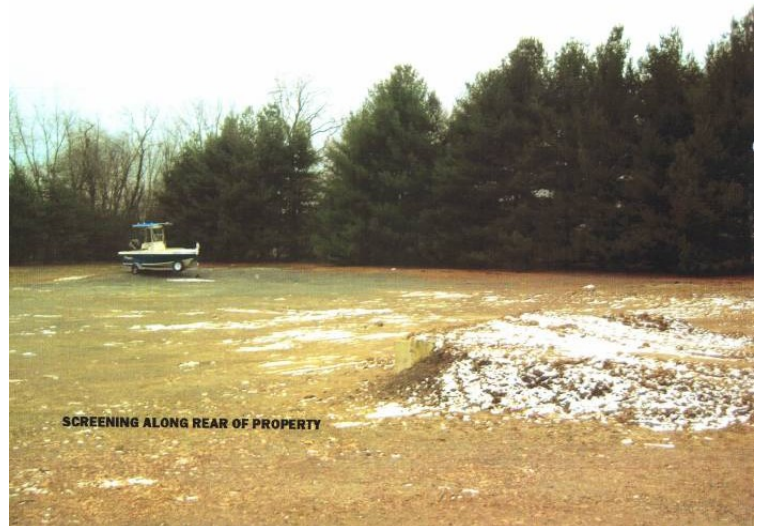
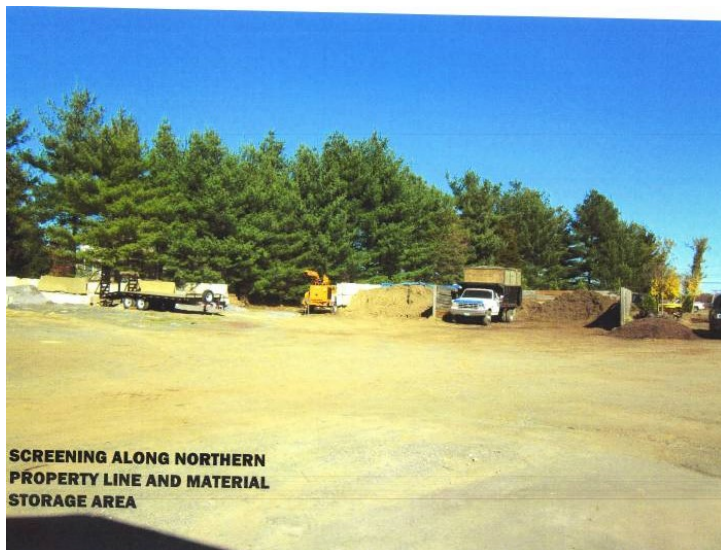
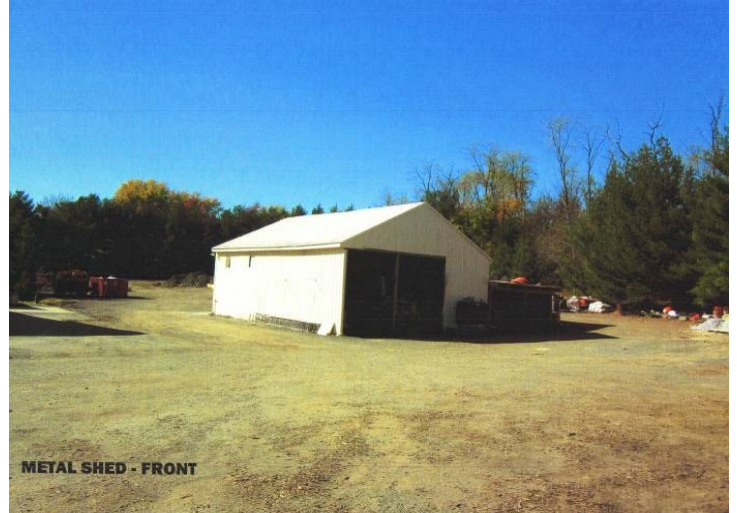
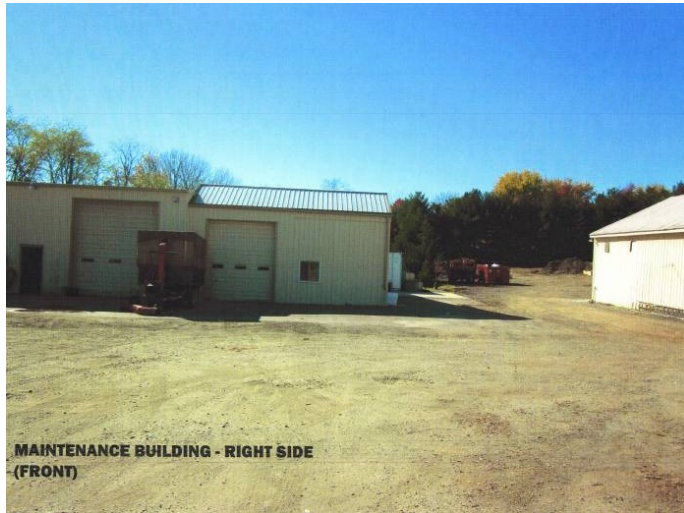




The site access from MD Route 108 can be seen in the above aerial photo, as can homes immediately adjacent to the site. According to Petitioner's land planner, William Landfair, the closest residence is about 25 feet from the northern property line, and others can be seen to the south and west of the site. Tr. 58. However, even before the addition of extra screening planned for the site, it can be seen on this photo that there are rows of trees screening the site from the houses to the north, south and west. This screening and other features of the site can be seen on the following photos submitted by Petitioner (Exhibit 8):



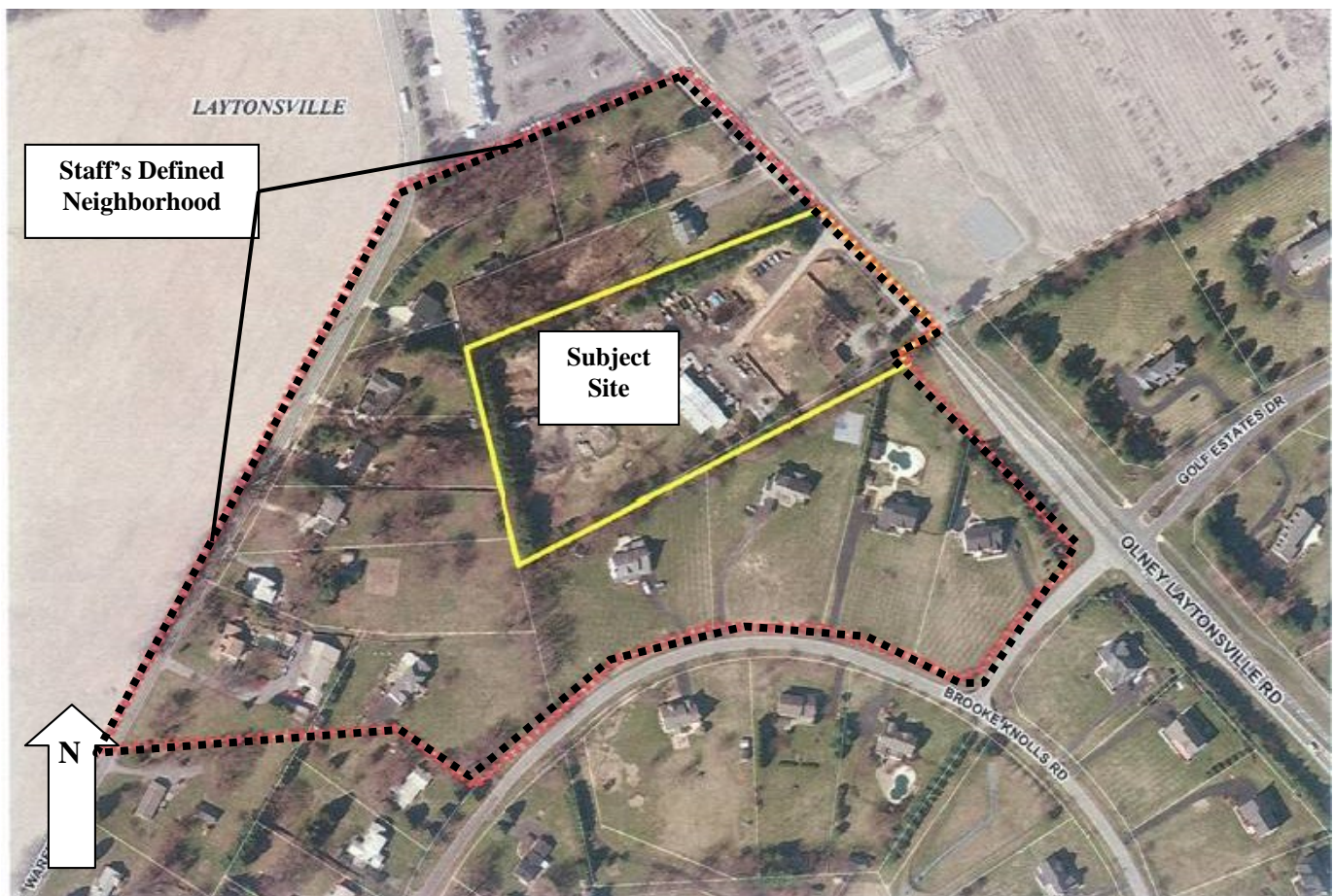






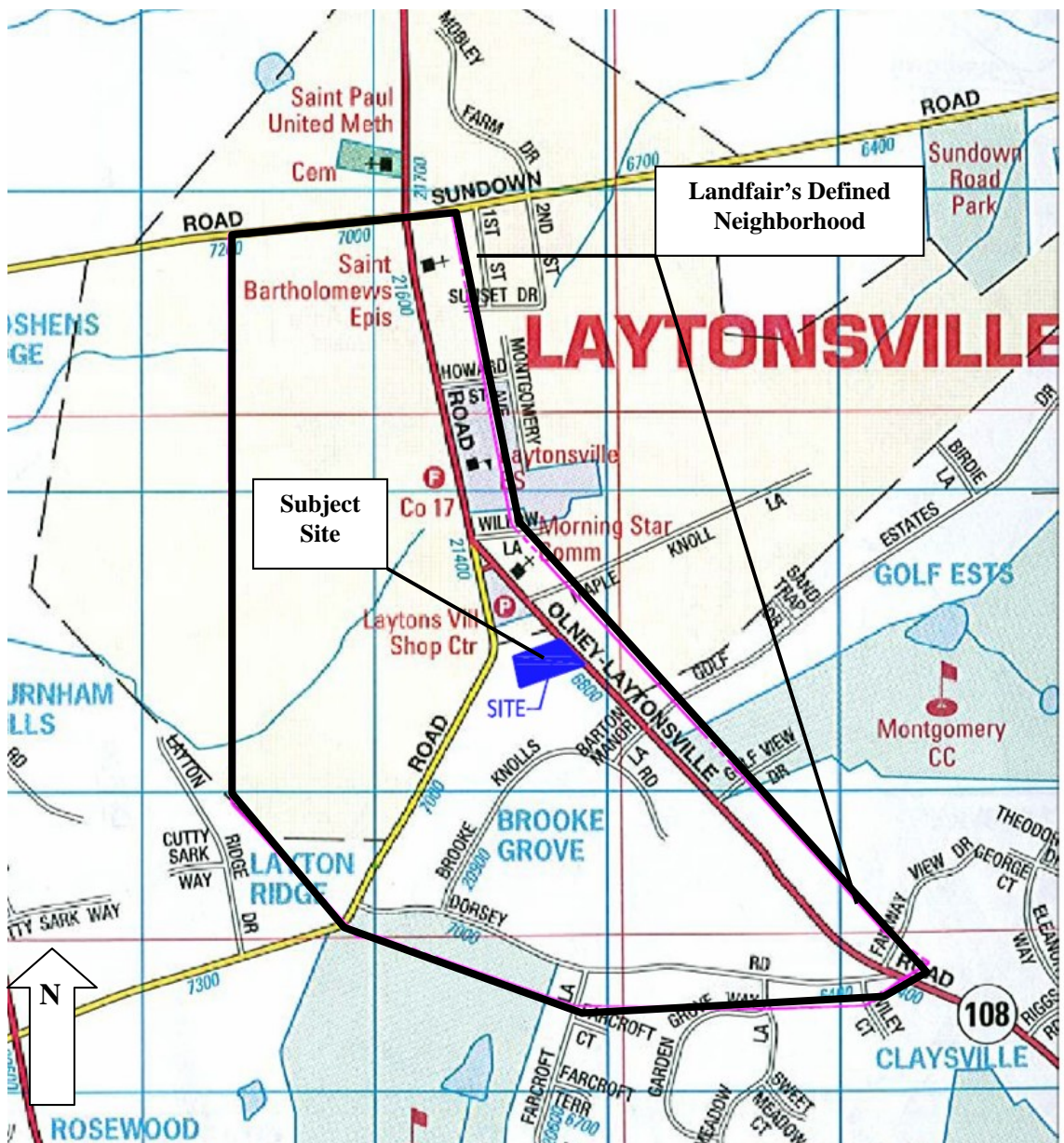


Technical Staff defined the general neighborhood as bounded by the Town of Laytonsville to the north and east, Olney-Laytonsville Road to the east, Brooke Knolls Road to the south, and Warfield Road to the west. Staff's defined neighborhood is depicted below (Exhibit 24(a), p. 3):





Petitioner's land planner defined the neighborhood more broadly than did Technical Staff, extending on the north up to Sundance Road, west to Warfield Road, south to Dorsey Road, and east to the east side of Olney Laytonsville Road. He did so to make sure to include all properties that possibly could be within sight and sound, or otherwise would have residents, visitors or employees that would pass by the property on any given day. Tr. 74-75. His proposed neighborhood definition (an attachment to his land use report (Exhibit 21(f)), is shown below:



Although it would not make a difference in the outcome of this case, the Hearing Examiner is inclined to agree with Mr. Landfair's proposed neighborhood definition because the defined neighborhood should at least include the properties on the east side of Olney Laytonsville Road. The occupants of those properties will not only see the subject site, but will also be directly affected by the truck traffic it produces. The immediate neighborhood consists of single-family homes in the R-200 zone. Directly confronting the subject property is the 19-acre Stadtler landscape contractor business located in the Town of Laytonsville. Technical Staff reports that there are two approved special exceptions in the vicinity. Several special exceptions were approved from 1969 to 1974 for a country club located at 6525 Olney-Laytonsville Road, located south of the subject property. A child day care special exception (CBA-1202 and CBA-1202A) at 6530 Olney-Laytonsville Road was approved in 2001, also located south of the property. Exhibit 24(a), p. 3. Mr. Landfair agrees that, for the most part, the surrounding area is residential in character, with large lot subdivisions. Tr. 60-61. He provides more detail in his report (Exhibit 21(f), pp. 2-3):

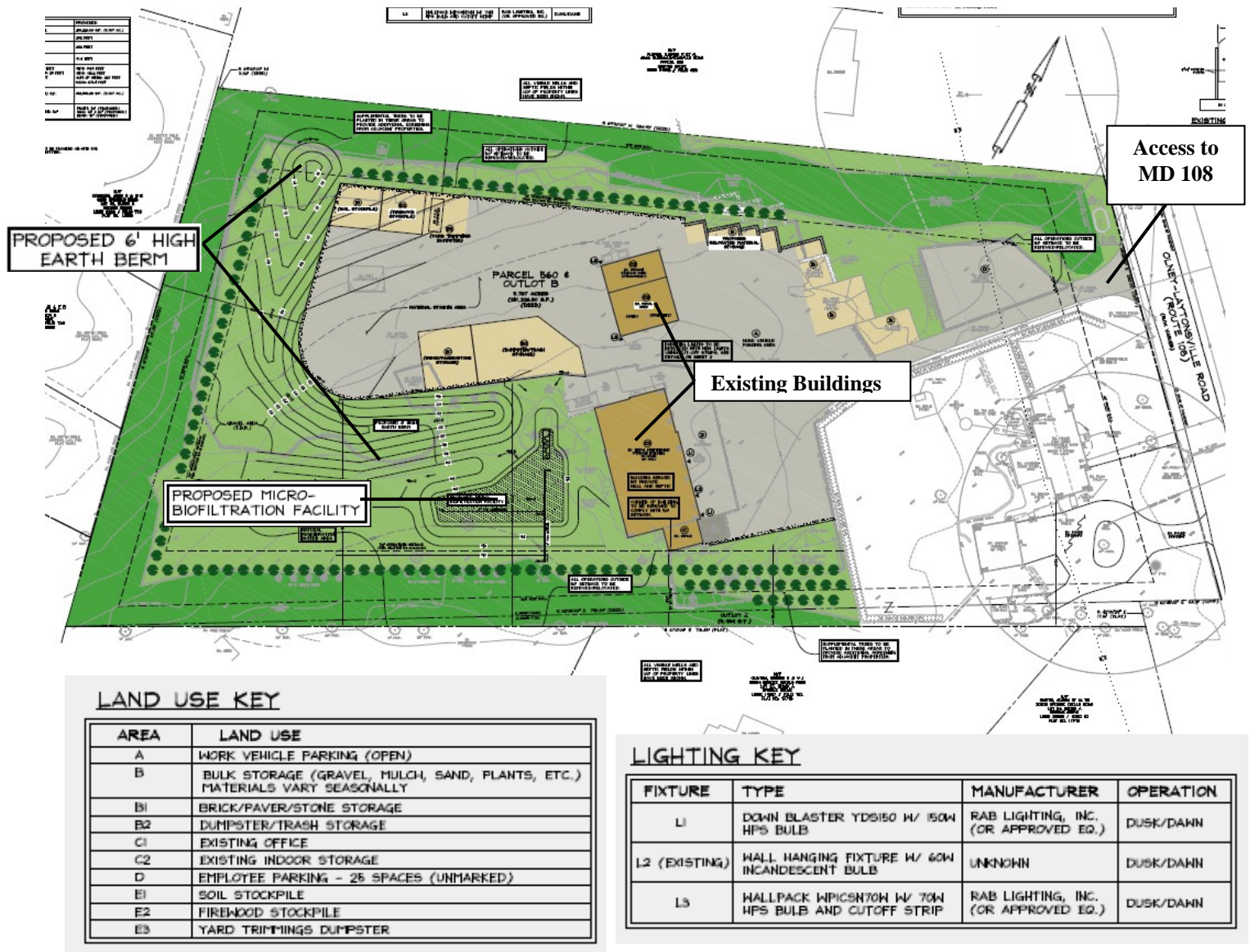
. . . The Property is zoned R-200, as are the properties immediately adjacent to the northwest, south and east. The adjacent properties located south of the Property are part of the "Brooke Grove" subdivision, which is a development of single-family homes on one to two acre lots in the R-200 Zone built between 1994 and 1996. Confronting the Property across MD 108 there is a 19-acre commercial nursery with Agricultural zoning in the town of Laytonsville. South of the nursery, and located outside the town limits, are single-family lots with RDT zoning.

. . . [T]he defined limits of the identifiable neighborhood includes that portion of the town of Laytonsville extending north to Brink Road/Sundown Road and west to include all of P600; single-family homes in the RE-2 Zone fronting along the north side of Warfield Road south to the intersection with Dorsey Road; that portion of Laytonsville Golf Course fronting the south side of Dorsey Road; residential properties in the RE-1 Zone fronting along Dorsey Road east to the intersection with MD 108; residential lots in the RC Zone fronting the east side of MD 108; and single-family lots on the east side of MD 108 in the RDT Zone. This defined neighborhood includes those intersections most affected by vehicular trips generated by the use: Brink Road/Sundown Road; Warfield Road/MD 108; and Dorsey Road/MD 108.



## B. Proposed Use

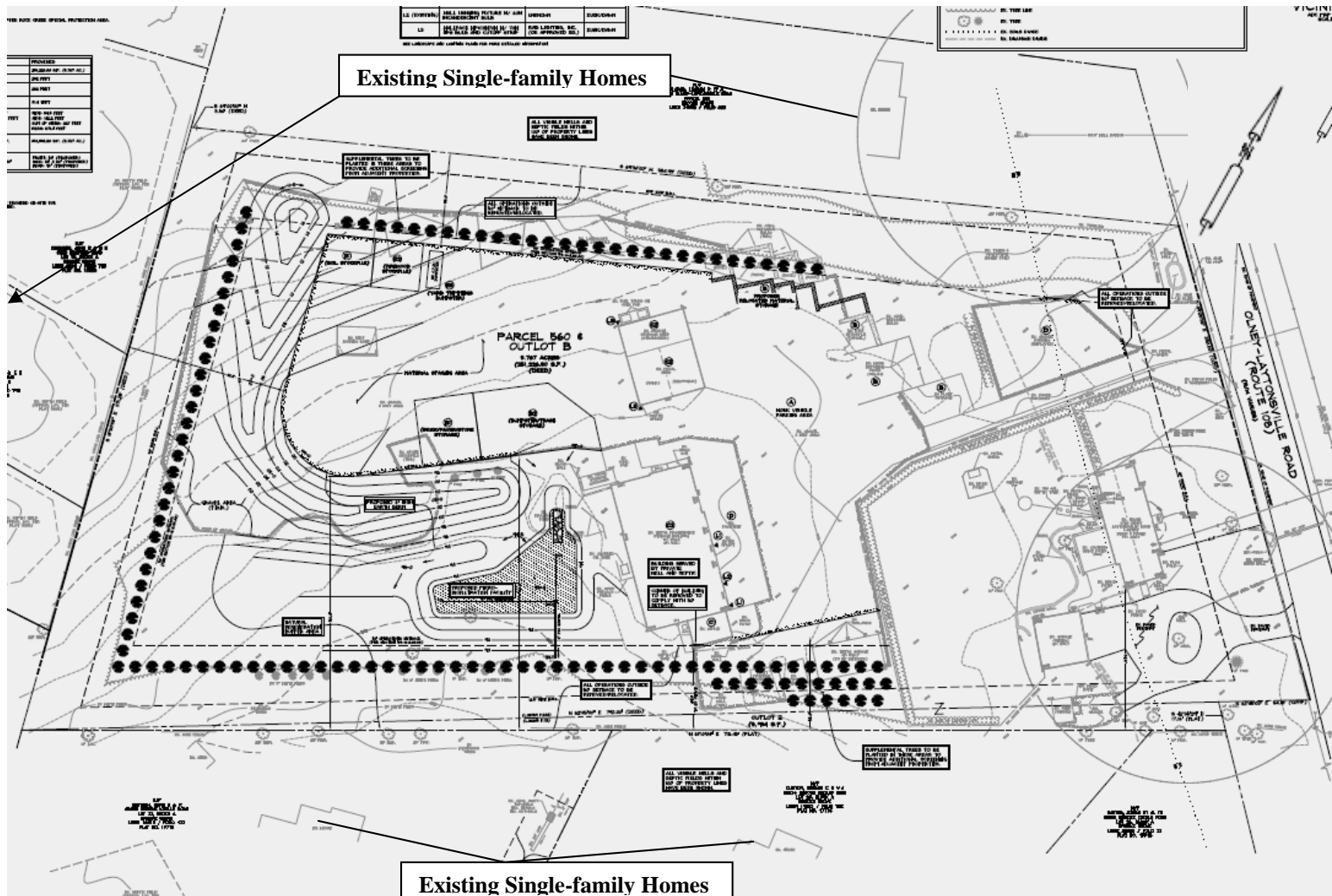
The Petitioner seeks the special exception to continue operating an established landscaping business on the subject site. The rendered Landscape Plan (Exhibit 21(d)), gives an excellent overview of the proposed operation.



The owner's residence is a fenced-off area on the southeast corner of the site, which is shown in white on the above plan. The grey areas represent gravel surfaces; the brown areas are buildings and the tan areas are locations where various materials are stored. The rows of trees and proposed six-foot berm for screening can be clearly seen on the plan.

## 1. The Site Plan:

These same features are displayed, albeit less colorfully, on the revised Site Plan (Exhibit 21(a)):



## LEGEND

### EXISTING FEATURES

- G — EX. GAS LINE WITH VALVE
- OH — EX. OVERHEAD UTILITY WITH POLE
- D — EX. DRAIN PIPE AND INLET
- UG — EX. UNDERGROUND UTILITY LINE
- 425 — 430 — EX. TWO- AND TEN-FOOT CONTOURS
- 25.0 — EX. SPOT ELEVATION
- O — EX. CHAIN LINK OR WIRE FENCE
- □ — EX. WOOD OR STOCKADE FENCE
- X — EX. METAL OR IRON FENCE
- ◀ S.L. — EX. SPOT LIGHT
- ▨ — EX. STONE OR WOOD WALL
- ▤ — EX. CONCRETE WALL
- ~~~~~ — EX. TREE LINE
- ☼ ☼ — EX. TREE
- ..... — EX. SOILS DIVIDE
- — — — — EX. DRAINAGE DIVIDE

### PROPOSED FEATURES

- 16 — 20.0 — PROP. CONTOUR WITH ELEVATION
- 20.0 — PROP. SPOT ELEVATION
- ☼ — PROPOSED SUPPLEMENTAL PLANTING (SPECIES VARIES, 10' ON CENTER, AS SHOWN)
- ◀ — PROPOSED LIGHT (TYPE VARIES)
- ▤ — AREA EXCLUDED FROM SPECIAL EXCEPTION APPLICATION



**ZONING DATA**

| ZONING: R-200                             | REQUIRED  | PROVIDED  |
|---|---|---|
| MINIMUM LOT AREA                          | 20,000 SQ. FT.  | 251,226.80 S.F. (5.767 AC.)   |
| MINIMUM LOT WIDTH AT R/W                  | 25 FEET   | 282 FEET  |
| MINIMUM LOT WIDTH AT FRONT BUILDING LINE  | 100 FEET  | 282 FEET  |
| MINIMUM SETBACK FROM STREET               | 40 FEET   | 61.4 FEET   |
| MINIMUM SETBACK FROM ADJOINING LOT        | ONE SIDE: 12 FEET<br>SUM OF SIDES: 25 FEET<br>REAR: 30 FEET | SIDE: 84.8 FEET<br>SIDE: 142.2 FEET<br>SUM OF SIDES: 227 FEET<br>REAR: 571.4 FEET |
| MINIMUM TRACT AREA (LANDSCAPE CONTRACTOR) | 2.0 AC (87,120) S.F.  | 251,226.80 S.F. (5.767 AC.)   |
| SETBACKS FOR LANDSCAPE CONTRACTOR         | FROM ANY PROPERTY LINE: 50'                                 | FRONT: 50' (PROPOSED)<br>SIDE: 50' & 50' (PROPOSED)<br>REAR: 96' (PROPOSED)       |

**GENERAL NOTES**

- 1) WATER CATEGORY - 6 SEWER CATEGORY - 6
- 2) BOUNDARY INFORMATION BASED ON A SURVEY PERFORMED BY CAS ENGINEERING, DATED DECEMBER, 2010.
- 3) TWO-FOOT CONTOUR DATA BASED ON A SURVEY PERFORMED BY CAS ENGINEERING, DATED DECEMBER, 2010.
- 4) TOTAL LOT AREA: PARCEL 560 = 245,242.80 SQ. FT. (5.63 ACRES, DEED)  
OUTLOT B = 5,984 SQ. FT. (0.137 ACRES, PLAT)  
TOTAL = 251,226.80 SQ. FT. (5.767 ACRES)
- 5) PROPERTY SHOWN ON TAX MAP GV 341, PARCEL 560, BROOKE GROVE.
- 6) PROPERTY SHOWN ON WSSC 200' SHEET 229 NW 07.
- 7) PROPERTY SHOWN ON MONTGOMERY COUNTY SOILS SURVEY MAP No. 8. SOIL TYPE(S): 2A, 2B.
- 8) FLOOD ZONE 'X' PER F.E.M.A. FIRM MAPS, COMMUNITY PANEL NUMBER 2403C 0184D.
- 9) SITE IS LOCATED IN THE UPPER ROCK CREEK & HAWLINGS RIVER WATERSHED.
- 10) LOCAL UTILITIES INCLUDE:  
WATER & SEWER - PRIVATE, ON SITE SYSTEMS  
ELECTRIC - PEPCO  
TELEPHONE - VERIZON  
GAS - WASHINGTON GAS
- 11) A PORTION OF THE SITE IS LOCATED IN THE UPPER ROCK CREEK SPECIAL PROTECTION AREA.

**PARKING TABULATION**

PER SECTION 59-G-2.30.00, ADEQUATE PARKING MUST BE PROVIDED ON-SITE FOR THE TOTAL NUMBER OF VEHICLES AND TRAILERS PERMITTED.

Technical Staff reports that the existing structures are proposed to remain on site, with the exception of a metal garage, which will be removed. A corner of the existing office will be removed, together with sections of the employee gravel parking lot, to comply with required 50-foot setbacks. Outdoor bulk material storage will be relocated, and the rear portion of the property will be regraded to provide a 6-foot high berm and a bio-filtration facility for stormwater management. Exhibit 24(a), p. 3.

**2. Landscaping and Lighting:**

As shown in the rendered landscape plan reproduced on page 11 of this report and in the chart below, the existing screening of White Pine trees will be supplemented with Leyland Cypress, American Holly, and Blue Spruce trees. Exhibit 24(a), pp. 3-4.

**PLANTING SCHEDULE**

| BOTANICAL NAME            | COMMON NAME     | SIZE    | FORM | SPACING | QUANTITY | NOTES                  |
|---------------------------|-----------------|---------|------|---------|----------|------------------------|
| CUPRESSOCYPARIS LEYLANDII | LEYLAND CYPRESS | 2' CAL. | B#B  | 10'     | 60       | OR APPROVED EQUIVALENT |
| ILEX OPACA                | AMERICAN HOLLY  | 2' CAL. | B#B  | 10'     | 30       | OR APPROVED EQUIVALENT |
| PICEA PUNGENS             | BLUE SPRUCE     | 2' CAL. | B#B  | 10'     | 30       | OR APPROVED EQUIVALENT |

SEE LANDSCAPE AND LIGHTING PLANS FOR MORE DETAILED INFORMATION

Petitioner's land planner, Bill Landfair, testified that the landscaping and screening, with the additional berm, will provide appropriate noise attenuation. Tr. 56-57. Technical Staff agreed, stating that the site "... is exceptionally well screened, and proposes additional landscape screening, the provision of an earth berm to attenuate noise ..." Exhibit 24(a), p. 10. The issue of noise will be further discussed below, in connection with the concerns of one of the neighbors.

There is little outdoor lighting proposed, and all of it will be located on the existing buildings, as shown in the plans reproduced above. Zoning Ordinance §59-G-1.23(h) provides that lighting levels along the side and rear of the lot lines must not exceed 0.1 foot candles and that luminaires must incorporate a glare and spill light control device to minimize glare and light trespass. The proposed lights are analyzed on the Landscape and Lighting Plan (Exhibit 21(c)), and none of the lights exceeds the standard set forth by 59-G-1.23(h). The proposed lamps are appropriately shielded, as can be seen in the following images from Exhibit 21(c):

**WALLPACKS  
YARD BLASTER &  
DOWN BLASTER**

High Pressure Sodium, Metal Halide and Compact Fluorescent. Photocell Controlled Dash-to-Dawn Yard Light.



heavy duty Photocell sensors to face desired direction

Shipped in highly protective sealed styrofoam packaging

Precision die cast aluminum housing with durable polyester powder coat paint

2" Mounting arm (YARM24) available

Mounting hardware included

hydroformed aluminum reflector for maximum light output

Protects dry pulse rated socket with spring loaded contacts

Lamp supplied

One piece acrylic reflector

Packaging has product features, ballast and lamp specifications plus lighting system photometrics and installation instructions



Down Blaster  
Full Cutoff  
45° beam light  
On the wall

3" Cutoff  
Below Horizontal


**Product Information**

| Lamp                       | Type | Base | Ballast | Starting Amps / Operating Amps | 100V     | 200V | 240V | 277V | Input Watts | Lamp ARGE | Initial Lumens | Lamp Hours |
|----------------------------|------|------|---------|--------------------------------|----------|------|------|------|-------------|-----------|----------------|------------|
| High Pressure Sodium       | 70   | ED17 | Medium  | RHPF 120V                      | 21 / 1.0 |      |      |      | 80          | 562       | 9,300          | 24,000     |
| Lamp supplied with fixture | 100  | ED17 | Medium  | RHPF 120V                      | 45 / 3.2 |      |      |      | 122         | 838       | 10,800         | 24,000     |
| Metal Halide               | 70   | ED17 | Medium  | MPI-HPF 120V                   | 21       |      |      |      | 80          | M58       | 5,800          | 15,000     |
| Lamp supplied with fixture | 100  | ED17 | Medium  | MPI-HPF 120V                   | 41       |      |      |      | 122         | M58       | 9,800          | 12,000     |
| Compact Fluorescent        | 65   | Co   | Medium  | MPI 120V                       | 3        |      |      |      |             |           | 4,300          | 8,000      |
| Lamp supplied with fixture |      |      |         |                                |          |      |      |      |             |           |                |            |

**Accessories**

Mounting Arm: (YARM24)  
2" curved steel arm 1.58" pipe diameter with grey polyester powder coat finish. Includes all mounting hardware.

**RAB  
LIGHTS  
YDS150**



JOB NAME: \_\_\_\_\_  
DATE: \_\_\_\_\_  
TYPE: \_\_\_\_\_

**DESCRIPTION**

Freely Shown Light. Full cutoff 70 and 100 watt HPS, 70 and 100 watt CFL, 45% more daylight than conventional town lights. Light is set off 30, below horizontal. Lamp supplied.

**SPECIFICATIONS**

| Housing   | Reflector   |
|---|---|
| Precision die cast aluminum with grey polyester powder coat finish  | Acrylic   |
| Socket: Precision dry Pulse Rated with spring loaded center contact   | Socket: Precision dry Pulse Rated with spring loaded center contact |
| Patents: Ball sensor and fuse designs are protected under U.S. and International Intellectual Property laws | U.S. Lighting   |
| Reflector: Hydroformed aluminum   | Colors: Natural   |
|   | Weight: 11.76   |

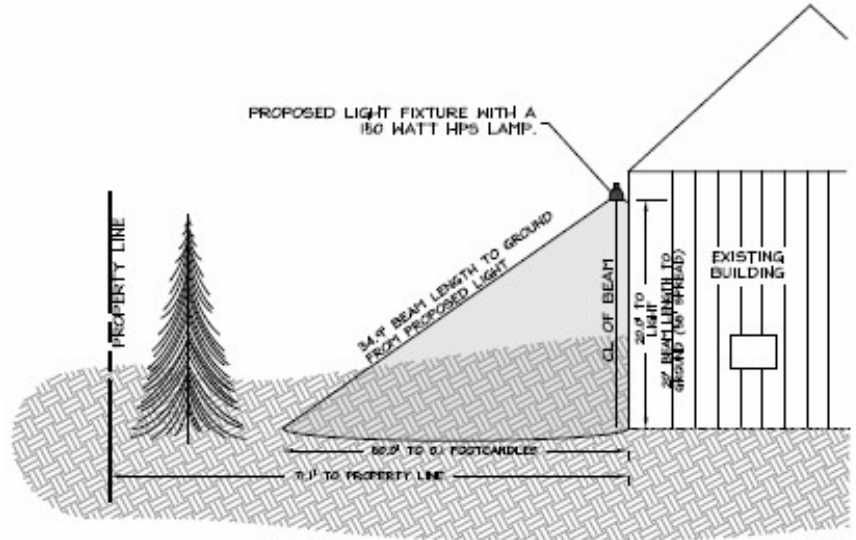
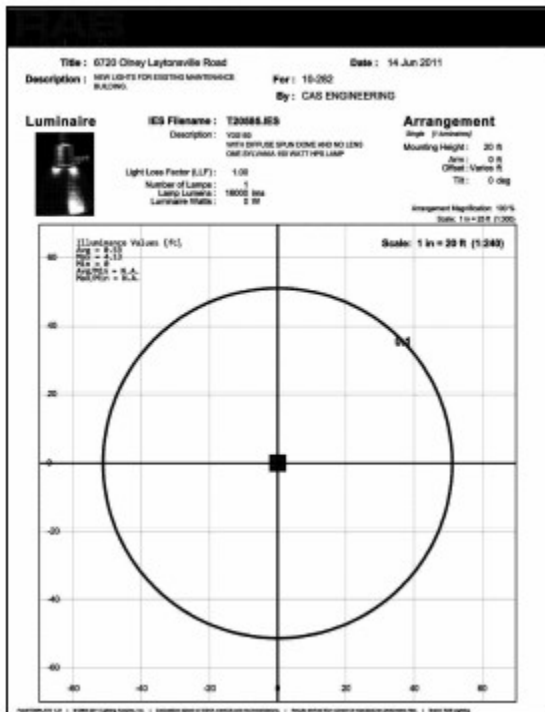
**ORDERING INFORMATION**

| High Pressure Sodium       | 70W  | 100W | 70W  | 100W | 70W  | 100W | 70W  | 100W | 70W  | 100W | 70W  | 100W |
|----------------------------|------|------|------|------|------|------|------|------|------|------|------|------|
| Lamp supplied with fixture |      |      |      |      |      |      |      |      |      |      |      |      |
|                            | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 |

Factory Installation Options:  
Add optional Grounding System

Note: Specifications may change without notice.  
RAB Lighting, Inc. • 170 Ludlow Avenue • Northvale, NJ 07647 • Tel: 888 RAB-1000 • Fax: 888 RAB-1232 • www.rablights.com  
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PROPOSED 150W HIGH PRESSURE SODIUM BEAM  
 (SECTION VIEW) (LI)  
 N.T.S.

**RAB LIGHTING**  
**WP1CSN70W/PC**

**DESCRIPTION**  
 Cubit Wallpack with glass shield for 35 - 100W HP, 30 - 100W MH (Pulse Start Standard) or 40W CFL. Lens is flat, tempered glass. 30, cutoff stop included. Lamp supplied.

**SPECIFICATIONS**

**Conduit Opening:** Top, side, and back

**Finish:** Chip and fade resistant polyester powder coating

**Housing:** Die cast aluminum, 1/2" NPS tapped top, both sides and back for conduit or predrilled. Hinged reflector. Continuous one piece silicone rubber gasket.

**Part:** 0640/683

**PhotoCell:** Custom PhotoCell installed and wired for 120V

**Reflector:** Semi-Specular anodized aluminum, removable for installation. Symmetrical light pattern maximizes distance between

**Mounting:** Ceiling template for easy wall box mounting

**UL Listing:** Suitable for wet locations. HID fixtures can be wired with 100°C supply wiring if supply wires are routed 2" away from the ballast.

**Color:** White

**Weight:** 40

**DIMENSIONS**

**PHOTOMETRIC**

70w MH @ 10' Mounting Height

| Mounting Height (ft) | Beam Diameter (ft) | Beam Area (sq ft) | Illuminance (fc) |
|----------------------|--------------------|-------------------|------------------|
| 10'                  | 10.0               | 78.5              | 1.7              |
| 12'                  | 12.0               | 113.1             | 1.0              |
| 14'                  | 14.0               | 154.8             | 0.7              |
| 16'                  | 16.0               | 201.1             | 0.5              |
| 18'                  | 18.0               | 254.3             | 0.4              |

**ORDERING INFORMATION**

| Lamp | Watts | Type | Base   | Ballast    | Starting Amps | Starting Voltage | Input Watts | LAMP | Initial | Lamp  |
|------|-------|------|--------|------------|---------------|------------------|-------------|------|---------|-------|
| 70   | 100   | 100  | Medium | 8 AMP 120V | 2.1 A         | 120V             | 800         | 300  | 6000    | 24000 |

**Packing Installed Options**

Add with to Catalog Number

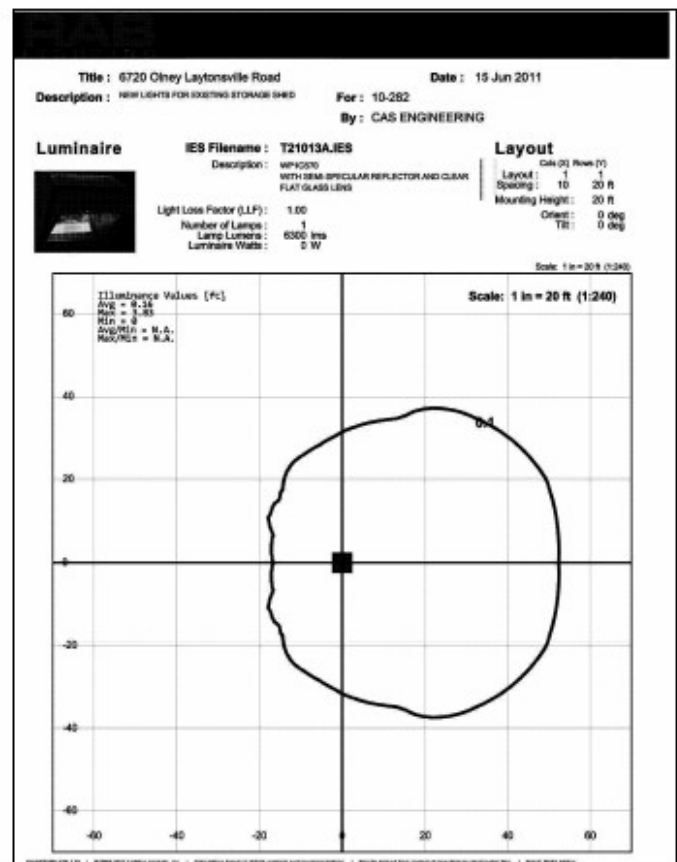
Temperproof version (TP)

Sealed PhotoCell (PC)

Single wiring for 120V and 277V (P)

**Note:** Specifications may change without notice

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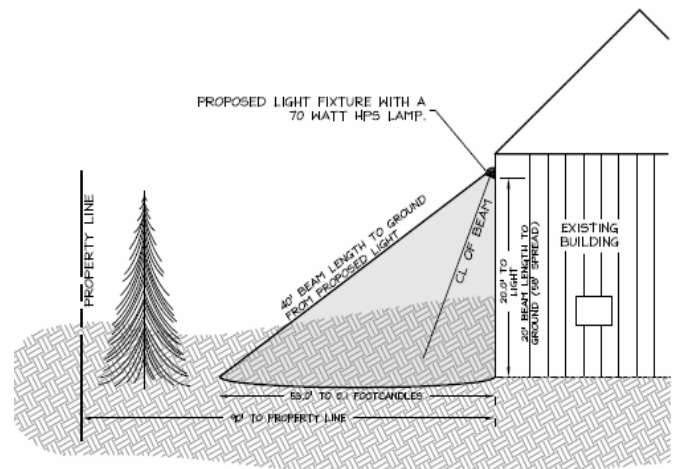
## FOOT CANDLES CALCULATION

PROPOSED WALLPACK: HPICSN70W W / 70W HPS LAMP (SEE DETAIL, THIS SHEET)

WORST CASE SCENARIO IS LIGHT ON NORTH SIDE OF WOODEN STORAGE SHED (90 FEET FROM PROPERTY LINE)

ASSUMED MAXIMUM MOUNTING HEIGHT: 20 FEET

PER THE ABOVE CHART, 0.1 FOOTCANDLES EMITTED AT APPROXIMATELY 53 FEET FROM LIGHT.



PROPOSED 70W HIGH PRESSURE SODIUM BEAM  
(SECTION VIEW) (3)

N.T.S.

Technical Staff confirmed that the lighting will meet the required standards (Exhibit 24(a), p. 14):

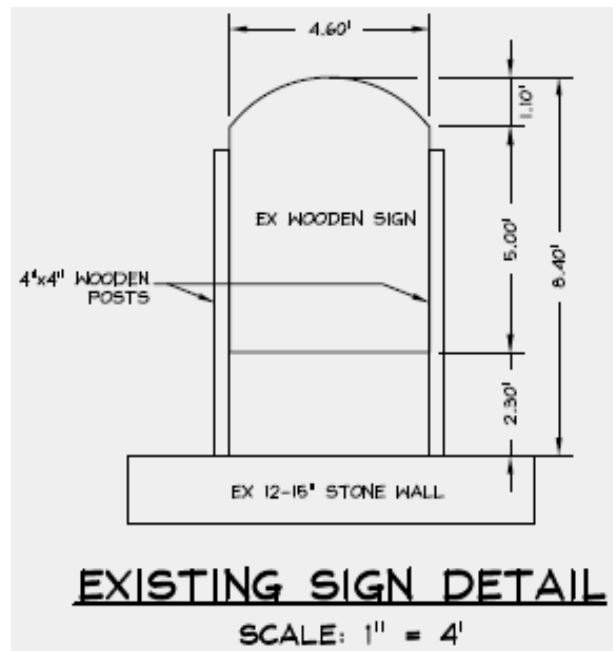
. . . The applicant is proposing to use two different light fixtures. Two 150 watt high pressure sodium beams will be placed on the metal maintenance storage building. Two 70 watt high pressure sodium beams will be placed on the metal shed and wooden storage shed. These lights will be shielded with cut off fixtures to minimize light diffusion. Light levels at all boundaries of the property will not exceed 0.1 foot candles.

### 3. Signage:

The sign currently on the site is depicted below (Exhibit 8(a)):



It is also schematically depicted on the Landscape Plan (Exhibit 21(b)):



The existing sign is not illuminated, but given its length and width (about 6 feet long and 4½ feet wide, for a total of about 28 square feet), it significantly exceeds the size of a sign permitted in a residential Zone (2 square feet) under Zoning Ordinance §59-F-4.2(a). Therefore, Petitioner must obtain a sign variance if the existing sign is to be retained, which Petitioner indicated it intends to do. Tr. 122-123.

Petitioner’s civil engineer, Curt Schreffler, testified that the existing entrance sign is unlighted and is located on a busy State highway, just south of a shopping center that has very large and ample signage. The subject site is just outside of the town limits of Laytonsville, which has several commercial properties, and across the street from another landscape contractor facility, so in his opinion, the existing sign is very much in character with other signs along this State highway – “it does not jump out at you . . .” Tr. 124.



The Hearing Examiner gave Petitioner leave to file an affidavit regarding the sign from its land use planner, with 10 days allowed for public comment. Tr. 125-126. Petitioner did so, filing the sworn affidavit of William R. Landfair (Exhibit 30(c)) on October 10, 2011, ten days before the record closed. Mr. Landfair stated, in his affidavit:

1. I am WILLIAM R. LANDFAIR, an Associate with VIKA Incorporated, an Engineering, Planning and Surveying firm located in Germantown, Maryland. I am over 18 years of age and I testified as an expert witness in the above-captioned matter on October 7, 2011.
2. I am familiar with the sign located at the entrance to the subject property situated along Olney-Laytonsville Road (MD 108) and I am aware of the size, content and character of the sign.
3. It is my opinion that, based on the nearby commercial properties which include a shopping center within ¼ mile, a commercial nursery located directly across the street and the road frontage on MD 108, the existing sign is compatible with the surrounding property and the characteristics of the area.
4. It is my opinion that the existing sign contains appropriate colors, and is of a nature that blends well with the surroundings and is consistent with other signs in the area.
5. In my opinion the existing sign will not adversely affect the health, safety security, morals or general welfare of residents, visitors or workers in the area. The existing sign will also not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.
6. Further it is my opinion that allowing the existing sign to remain will not cause a proliferation of signs in the area, and will not cause any adverse effects on neighboring properties.

There was no responsive filing from the community regarding the sign, and both Technical Staff and the Planning Board took the position that the sign had to be removed “unless a variance is granted or the applicant brings the sign into compliance with the requirements.” Exhibit 24, p. 2. Of course, that begs the question of whether the Board of Appeals considers the existing sign to be an appropriate one, even if a variance can be obtained.

Given the commercial nature of much of the surroundings; the fact that the sign is located on a major road; that it is identifying a large business permitted in the Zone by the Zoning Ordinance; and that there is no evidence in this record to contradict the testimony of Petitioner’s

civil engineer and its land planner that this unlighted sign is compatible with its surroundings, the Hearing Examiner so finds. The following condition is recommended in Part V of this report:

The existing sign must be removed unless a sign variance is granted or the Petitioner brings the sign into compliance with the requirements of the Zoning Ordinance. If a sign variance is obtained, the Board approves the existing, freestanding, non-illuminated sign, as depicted on the Landscape and Lighting Plan (Exhibit 21(b)). Petitioner must file a copy of its sign permit with the Board of Appeals.

#### **4: Operations:**

Operations for the site, as limited by recommended conditions, are set forth neatly in the Planning Board's letter of September 29, 2011 (Exhibit 24, pp. 2-3):

1. The applicant is bound by all submitted statement and plans.
2. A maximum of twenty-five (25) employees are permitted on site at any one time.
3. Regular weekday hours of operation are limited to 6:00 A.M. to 6:00 P.M. for office workers and 7:00 A.M. to 6:00 P.M. for yard staff and landscape crews, except for snow removal operations which may occur as needed. Saturday hours are limited to 7:00 A.M. to 6:00 P.M. for office workers and 8:00 A.M. to 4:00 P.M. for yard staff and landscape crews. Customers are not permitted on-site.
4. Vehicles are limited to a total of twelve (12) work trucks, three (3) sales vehicles, nine (9) trailers, two (2) rubber tire loaders, and two (2) skid loaders. All vehicles, when not in use, must be parked in the designated parking areas, as indicated by the provided site plan. On-site parking is limited to a total of twelve (12) employee parking spaces, which includes one handicapped parking space.
5. All deliveries and pick-ups will occur between 8 A.M. and 4 P.M., Monday through Friday.
6. A corner of the existing office will be removed, an existing metal garage will be removed, and corners of the employee gravel parking lot will be removed to come into compliance with the 50-foot setback requirements. All on-site landscape activities, including storage, parking, and related outdoor operations, are restricted to within the 50-foot Building Restriction Line (BRL) identified on the Site and Landscape Plan. No manufacturing for mulch or compost, or selling of plants will take place on-site.
7. No materials classified as hazardous waste will be stored on the property, and no pesticides, manure, or chemicals will be stored on site at any time with the exception of fertilizer and 'Ice Melt,' which will be stored in bags, within a building and off the ground.
8. Tree chippers or splitters will not be used on-site.
9. There will be no outdoor lighting, except that which exists in the vicinity of the residence, office building, and storage building.
10. The sign will be removed unless a variance is granted or the applicant brings the sign into compliance with the requirements.
11. Gravel parking spaces will be designated by wheel stops.
12. Trucks will be loaded and reversed in place in the afternoon to pull forward in the morning without backup beepers.

Some additional detail is provided by Petitioner's Statement of Operations (Exhibit 30(b)):

JB Kline provides landscaping services which include lawn care, hardscape design and installation, landscape design, installation and maintenance, and snow removal (seasonal). Employees consist of office workers who typically arrive between 6 a.m. and 7 a.m. (except Saturdays when the start time will be 7 a.m.) who park their vehicles in front of the Existing Metal Maintenance and Storage Building (shown on the Special Exception Site Plan, Exhibit 21 (a)) and walk to the Office located at the southern end of that Building. Landscaping Crew employees typically arrive at the Property between 7 a.m. and 7:30 a.m. (except on Saturdays when the start time is 8 a.m.), park their personal vehicles, pick up work instructions for the day, load the trucks with supplies, and leave the Property to visit and service job sites. Landscaping Crew employees return to the Property between 5 p.m. and 5:30 p.m. (no later than 4 p.m. on Saturdays), unload excess materials and yard clipping or debris in the appropriate receptacles or bins, re-fuel the trucks, and then park the work trucks, moving around the site in a counter-clockwise manner, and leave the Property in their personal vehicles. Office employees who remain on-site during the day (a maximum of 7) are comprised of clerical and professional staff, including a receptionist and landscape designers, estimators, along with employees involved in keeping the site organized, meeting delivery vehicles, and off-loading deliveries. The only exception to the above working hours occurs during snow removal or emergency weather operations, during which the employees may work extended and/or weekend hours as necessary.

Petitioner's Statement of Operations also notes that "The Proposed Special Exception is limited to the following operational components:

1. Continue the existing "Landscape Contractor" use on the Property as a special exception and permit the existing buildings/improvements to remain in place or be relocated or removed as indicated on the Special Exception Site Plan (Exhibit 21 (a)).
2. Permit a maximum of 25 employees during the peak season (March 2nd – December 31st) and a maximum of 12 employees during the off-season (January 1st – March 1st), plus the Petitioner who runs the business on-site. A maximum 7 employees will remain on-site during the day, including office staff.
3. Permit a maximum of 12 trucks, 3 sales vehicles, 9 trailers, 2 rubber tire loaders, 2 skid loaders, 1 tree chipper (which will not be used on-site), and various lawn mowers, string-line trimmers, back pack blowers, and snow plow blades (to be attached to other permitted vehicles) to be stored on the Property and utilized in the operation. See Exhibit 21 (m) – List of Equipment Used On-site.
4. Permit plants, manufacturer-bagged fertilizer, manufacturer-bagged ice melt, mulch, topsoil, yard trimmings, firewood (for personal use only – no sales), patio pavers and aggregate (stones) to be stored on-site. There is no mulch manufacturing on-site.
5. Fertilizer and ice-melt shall be stored in bags, within a building and off the ground.
6. Hours of operation are limited to:
  - (i) Office staff 6 a.m. – 6 p.m., Monday-Friday (on most days only the owner, Brian Kline, will arrive before 7 a.m.), and 7 a.m. – 6 p.m. on Saturday;



- (ii) Landscape crews and yard staff 7 a.m. – 6 p.m., Monday-Friday, and 8 a.m. – 4 p.m. on Saturday;
  - (iii) The operation will be closed on Sunday; and
  - (iv) Snow removal operations and emergency weather conditions may require extended hours and/or weekend operations.
7. Permit a maximum of 3 deliveries/week for supplies, 2 trash pick-ups/week, 2 yard trimmings pick-ups/month, and 1 recycling pick-up/week, none of which will occur prior to 8 a.m. nor after 4 p.m., Monday thru Friday only.
  8. No outdoor lighting, except that which is shown on the Landscape and Lighting Plans (Exhibits 21 (b)-(d)).
  9. No customers will visit the Property.
  10. No material classified as hazardous waste will be stored on the Property at any time.
  11. No pesticides, chemicals or manure (other than the previously described fertilizer and ice-melt) will be stored on the Property at any time.
  12. Fertilizer and ice-melt will only be stored on the Property in manufacturer packaging (bags) and in limited quantities (approximately 30-40 bags or 1 pallet for each product). All fertilizer and ice-melt will be stored within a building and off the ground.
  13. No horticultural nursery (wholesale or retail) or mulch/compost manufacturing operation will be conducted on the Property.
  14. The landscape contractor business will comply with Montgomery County's Noise Ordinance.

Both the planning Board's recommended conditions and Petitioner's Statement of Operations have been incorporated into the Hearing Examiner's recommendations in Part V of this report.

## **5. Public Facilities, Parking and Parking Waivers:**

### **a. Public Facilities:**

The adequacy of transportation facilities was addressed at the hearing by Craig Hedberg, Petitioner's expert in transportation planning and traffic engineering. Tr. 76-82. Mr. Hedberg testified that he had a traffic count taken at the subject site, which is served by a single driveway onto Maryland Route 108, a major highway. He then determined the existing highest peak hour of site trips, which turned out in this case to be nine peak hour trips in the evening peak hour.

Under the County's policies, a full local area transportation review (LATR) is required when there will be more than 29 peak hour trips generated. Because the maximum number of peak hour trips counted here was nine, the count fell well below the threshold where there would have to be an

external traffic analysis conducted. The peak hour was the same for 6:30 a.m. to 7:30 a.m. and 6:45 a.m. to 7:45 a.m., where seven trips were counted. In making these counts, Mr. Hedberg counted as if this were a newly created operation on the site.

Mr. Hedberg further testified that the second part of the County transportation test is the policy area mobility review (PAMR). Because this site is located in a rural area, there is no PAMR trip mitigation requirement. He opined that under both aspects of the County's transportation test, this site doesn't require any further analysis and meets the criteria of both.

Even assuming the worst case scenario, that all the workers were getting in their trucks and leaving in one peak hour, the maximum trips the site could generate would be 27 trips, which would still be below the trigger for the local area transportation review.

Mr. Hedberg opined that, in terms of the traffic impact of the special exception, the proposed operation will be safe and adequate for vehicular and pedestrian circulation. He based this conclusion on the fact that this is an existing operation, and there is no retail component. Hence, there will not be customers attracted to the site. Mr. Hedberg testified that the site is well laid out, and there is a systematic way of getting ready for the next day, the way that the trucks circulate and load. He stated that it is an adequate and safe operation, and the proposed operation would not have an adverse impact on the transportation facilities of the area.

Technical Staff agreed with this conclusion, finding that no LATR or PAMR review is required, and "that the proposed landscape contractor business under the subject special exception application will have no adverse affect on area roadway conditions." Exhibit 24(a), p. 5.

As to other public facilities, Mr. Landfair testified that there are adequate electric, telephone and gas lines located within the adjacent road right-of-way. The closest Police and Fire stations are four miles and a quarter of a mile respectively from the property, which is an acceptable distance. He concluded that the special exception will be served by adequate public facilities. Tr. 74.

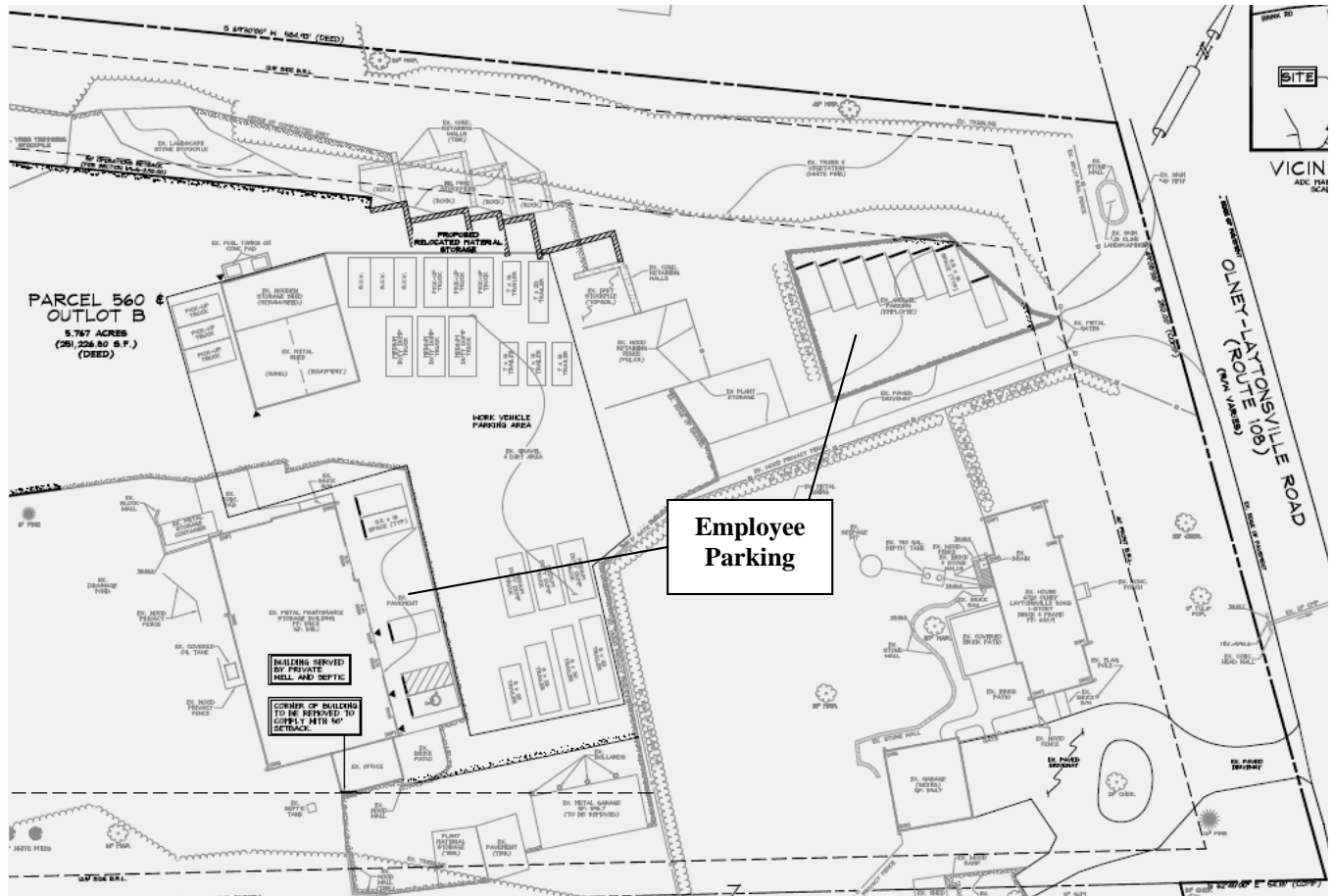
Technical Staff also listed the adequate public facilities that are available to the site, and noted that the proposed use does not require public water or sewer services, as the site is served by private on-site well and septic systems. Staff also observed that the special exception use does not require approval of a preliminary plan of subdivision at this stage, but one will be required if a building permit application is submitted in the future. Exhibit 24(a), pp. 11-12.

*b. Adequacy of Parking Provided:*

Zoning Ordinance §59-D-2.30.00(3) provides:

(3) *The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on site must be limited by the Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.*

In response to this requirement, Petitioner provided a Schematic Parking Plan (Exhibit 21(h)), showing the location of all on-site parking for operational and employee vehicles:





Twelve employee parking spaces are provided, at the locations depicted above. Brian Kline, the owner of the business, testified that the parking that is proposed in this application will be sufficient for the number of employees because it has worked fine for many years. No customers come to the site. Exhibit 21(l) is parking survey in which he counted the number of employees that came to the site every day from April 15, 2011 to June 24, 2011, as well as the number of vehicles that came to the site every day. During that whole time of the survey, he never needed all of the 12 parking spaces designated for his employees. Tr. 33. A review of the survey indicates that there were never more than 21 employees on the site, and there were never more than 9 vehicles. In fact, only once did 9 vehicles appear. On most days, 8 vehicles came to the site.

Technical Staff determined that “there is adequate parking for employee vehicles and equipment.” Exhibit 24(a), p. 14. Staff noted that the 12 passenger vehicle spaces shown on the Schematic Parking Plan “will be more than adequate to serve the on-site parking needs based on actual operating experience. Additional parking is shown on the plan to accommodate trucks, loaders and equipment.” Exhibit 24(a), p. 14. There is no contradictory evidence in this record.

c. Parking Waiver Issues:

In spite of the adequacy of the number of parking spaces provided on site, the parking facility does not fully comport with all the regulations in the Zoning Ordinance that may apply. Therefore, Petitioner has requested waivers of eight parking regulations, as set forth by Mr. Landfair (Tr. 64-69):

1. The first waiver is from Section 59-E-2.21, which pertains to the arrangement and marking of spaces. Given the size of this parking facility, because it is so small, no directional signage is needed, nor is it possible or practical because it is paved in gravel, to actually delineate the individual spaces. The wheel stops that are proposed for those spaces will be more than sufficient.
2. The second waiver is from Section 59-E-2.4, relating to access and circulation. It calls for each space to have access to a public street or alley, and have interior drive isles, but the circulation will be more than sufficient for this site, and it will be safe and efficient. Trucks and vehicles can circulate around the site without the need to back up.

3. The third waiver is from section 59-E-2.41, which relates to the widths of driveways. The code requires a 10-foot drive isle for one-way movement, and a 20-foot drive isle for two-way movement. Two-way movement on the existing driveway is limited. The width of this driveway is between 12 and 14 feet. However, no customers are visiting the property. The employees are typically arriving at the same time, or departing at the same time. On those infrequent occasions when two vehicles may be on the driveway at the same time, there is ample room to the side of the driveway to accommodate these vehicles without affecting safety.

4. The fourth waiver is from Section 59-E-2.42, which calls for the provision of pedestrian walkways. Because of the size of the parking area, they are not necessary. The parking area is only to be used by employees who are familiar with the area. It's not to be used by the general public. If you added the walkways, it might contribute to a commercial appearance of the parking area, which might detract from the character of the site, particularly from the road.

5. The fifth waiver is from Section 59-E-2.43, which calls for separation from walkways with curbing. Again, there are ample setbacks, and mature landscaping which separate this parking area from the surrounding site. There is no sidewalk along this side of the roadway to connect a sidewalk, and a sidewalk would, again, contribute to a commercial appearance.

6. The sixth waiver is from section 59-E-2.6, regarding lighting, to ensure that there is adequate lighting, particularly at night. The majority of the work done on site is by employees. It is done primarily during daylight hours. There is only a small percentage of work that might be done during the winter months when employees might be on the site when it is dark. On balance, the installation of lighting would not change the visibility dramatically, or help the employees that much, given their limited use of the facility during the night. Again, it would contribute to a commercial appearance of the site. The parking area has been in existence for quite some time, and has operated well without lighting.

7. The seventh waiver is from Section 59-E-2.74, requiring planting islands. To accommodate that requirement for this parking facility would mean enlarging it considerably, which would create greater land disturbance, and would, again, increase visibility from the roadway. The facility is almost completely surrounded by landscaping, and there would be no benefit to adding planting islands.

8. The eight and last waiver is from Section 59-E-2.83, requiring internal landscaping for shading. The goal for this requirement is to ensure shading of the parking area and screening in residential areas, but there are sufficient mature trees surrounding the parking area that it is not necessary to provide any additional internal landscaping, and the site is well screened, so it won't adversely impact the surrounding residential area.

In Mr. Landfair's opinion, the requested waivers are consistent with the standards for the waiver requirements. Tr. 64-69. Moreover, the project complies with the parking regulations set

forth in Section 59-E of the Code, except with respect to the requested waivers. That includes the size of the spaces themselves, as well as the provision of handicapped spaces.

Staff reviewed each of these requested waivers in its report, and recommended that all the ones needed be granted. A number of those initially requested were not needed because Petitioner was already in compliance. Exhibit 24(a), pp. 16-21. In a supplemental report, Technical Staff opined that even where there was ostensible non-compliance with the terms of Zoning Ordinance §§59-E-2 *et seq.*, the waivers were probably not needed, assuming the case were evaluated in a manner consistent with past practice. As stated by Staff (Exhibit 25):

One additional comment - The applicant applied for a number of parking design standard waivers under Sec. 59-E-2.2., believing the Ordinance was ambiguous and that it could conceivably be interpreted as an additional requirement to those under 59-E-2.83. Staff reviewed these as part of the application. The [Planning] Board informed the applicant that the requirements under 59-E-2.2. had not, historically, been applied to special exception uses in residential zones, and that the waivers were unnecessary.

There is no contrary evidence in this record. Therefore, the Hearing Examiner recommends in Part V of this report that, to the extent necessary to allow parking as configured in the Schematic Parking Plan (Exhibit 21(h)), waivers be granted of the parking regulations contained in Zoning Ordinance §§59- E-2.21 (arrangement and marking), 2.4 (access and circulation), 2.41 (driveways), 2.42 (walkways), 2.43 (separation of parking spaces), 2.6 (lighting), 2.7 (landscaping), and 2.83 (shading of parking area).

### **C. The Environment**

Petitioner's revised Natural Resource Inventory/Forest Stand Delineation (NRI/FSD, 42011168E) has been approved, and it is in the record as Exhibit 23(b). Technical Staff also approved an exemption from submitting a Forest Conservation Plan because the application is for an existing structure and the proposed use will not result in the clearing of existing forest or trees. Staff's August 30, 2011, letter so stating is in the record as Exhibit 23(c).



As shown on the NRI/FSD, there are no streams, wetlands, or forests on the site; however, the site is partially in a special protection area (SPA), and as a result, a water quality plan is required. Zoning Ordinance §59-G-1.23(e). Petitioner submitted the required Preliminary/ Final Water Quality Plan (Exhibits 21(o) and (p)), and the Montgomery County Department of Permitting Services (DPS) conditionally approved it by letter dated September 1, 2011 (Exhibit 27). On October 20, 2011, the Planning Board approved the Preliminary/ Final Water Quality Plan, subject to the conditions imposed by DPS (Exhibit 31(a)).<sup>4</sup> The Hearing Examiner included a condition in Part V of this report recommending that Petitioner be required to comply with the approved Preliminary/ Final Water Quality Plan (Exhibits 21(o) and (p)).

As noted in the beginning of this report, the subject site is not only in the R-200 Zone, it is also in the Upper Rock Creek Environmental Overlay Zone. The latter Zone has severe restrictions on imperviousness in order to protect water quality in the SPA. Zoning Ordinance §59-C-18.242(c). However, the Overlay Zone's restrictions do not apply in this case because the site is not served by community sewer service. Zoning Ordinance §59-C-18.242(a). To ensure that the site could continue to be served by private well and septic, Technical Staff recommended that Department of Permitting Services' (DPS) Well and Septic Division evaluate the septic capacity for the landscape contractor to determine if it is adequate. Exhibit 24, p. 3. DPS did so, and on October 6, 2011, determined by percolation testing that there was adequate septic capacity for the use proposed on the site. Exhibit 28. The Hearing Examiner therefore concludes that the site is exempt from the regulations of the Overlay Zone.

Nevertheless, in accordance with the 2004 Upper Rock Creek Area Master Plan (pp. 48-49),

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<sup>4</sup> The Hearing Examiner notes that the Planning Board voted to approve the Preliminary/ Final Water Quality Plan on October 20, 2011, as indicated in Exhibits 31 and 31(a), but the final version of the Planning Board's resolution is dated October 28, 2011, the date it was mailed out (Exhibit 32). Because the record had already closed on October 20, 2011, that final version is not included in the hearing record, although a copy is retained in the file as Exhibit 32. The Hearing Examiner found the evidence of Planning Board approval submitted on October 20, 2011, to be sufficient.

development in the watershed should use design techniques to reduce imperviousness, since “[m]inimizing imperviousness is one of the best methods for assuring protection of water resources . . .” As shown on Petitioner’s Impervious Area Schematic (Exhibit 21(i)), Petitioner will reduce the imperviousness of the site from the current 48.62% to 34.06%, which represents a 29.9% reduction in imperviousness. Technical Staff characterized this step as “a significant improvement over the current configuration of the Property.” Exhibit 24(a), p. 5. Staff described the steps taken to achieve this improvement (Exhibit 24(a), p. 5):

. . . The Applicant has modified the operation to reduce the impervious surface area required for truck loading and unloading, parking and material staging to the minimum necessary. The Applicant has also proposed reducing the impervious area to allow a significant portion of the rear of the Property to be devoted to grass, a berm and a large area of undisturbed natural growth.

This reduction in imperviousness was also listed by the Planning Board as one of the reasons for its recommendation of approval. Exhibit 24, p. 2.

In addition to reduced imperviousness, Petitioner proposes to add a “Micro-Biofiltration Facility” in the south center portion of the site to capture and treat stormwater runoff from the impervious areas on site. According to the testimony of Petitioner’s civil engineer, Curt Schreffler, it will meet current standards set by Maryland and Montgomery County for environmental site design. Tr. 44. At present there is no treatment of stormwater runoff on the site, so this proposal will be a decided improvement for the environment.

The only other environmental issue in this case is the allegation by a neighbor, Kevin Deutsch, that runoff from the site was contaminating his well water. That issue will be discussed in the section of this report addressing community concerns, Part II. E.

Based on this record, the Hearing Examiner finds that all environmental issues have been appropriately addressed by Petitioner, and that the actions proposed in support of this application will result in an improvement for the environment over existing conditions.

### **D. The Master Plan**

The property in question is subject to the 2004 Upper Rock Creek Area Master Plan. Petitioner's land planner, William Landfair, testified that the special exception will be consistent with the general plan for the physical development of the district, including the Upper Rock Creek Master Plan area. Mr. Landfair suggested that while the Master Plan does not offer recommendations for special exceptions, it does support the existing R-200 zone for the property, and the R-200 Zone allows landscape contractors as special exceptions. The Master Plan talks about minimizing imperviousness as one of the best ways of assuring protection of the sensitive water resources in the area, and Petitioner has done just that for this property, as well as the provision of a bio-filtration facility. Tr. 70-71.

Technical Staff agrees that the 2004 Upper Rock Creek Area Master Plan does not offer general recommendations or guidelines for special exceptions. Moreover, the Plan makes no specific recommendations for this property or for this portion of the planning area. Exhibit 24(a), p. 4. A portion of Staff's discussion of the Master Plan is quoted below (Exhibit 24(a), pp. 4-5):

... In general, the Plan recommends this area for the relatively low density land uses allowed in the one-family residential zones. These recommendations are to some extent premised on expected residential development. The R-200 Zone allows a number of commercial and service uses by special exception, which means that they are deemed appropriate in the zone with the additional scrutiny afforded by the special exception process. For that reason, this use in this zone at this location is consistent with the Upper Rock Creek Area Master Plan, with the conditions proposed as part of this report.

Staff continues with a discussion of the Master Plan's objective of reducing imperviousness, which was discussed in the previous section of this report, and concludes that, "The proposed special exception use is consistent with the Upper Rock Creek Area Master Plan." Exhibit 24(a), p. 5.

Based on this record, as well as the fact that the Upper Rock Creek Area Master Plan (pp. 93-94) approves the R-200 Zone for the subject area, and the R-200 Zone permits landscape



contractors as special exceptions (Zoning Ordinance §59-C-1.31(c)), the Hearing Examiner finds that the proposed special exception is consistent with the applicable Master Plan.

### **E. Community Concerns**

The only community response expressed in this case came in the form of correspondence to Technical Staff from two of Petitioner's neighbors, John Connors and Kevin Deutsch, and a follow-up letter faxed to the Board of Appeals from Mr. Deutsch on the day before the hearing (Exhibit 26).<sup>5</sup> No community witnesses appeared at the hearing.

As noted by the Planning Board in its letter of September 29, 2011, Mr. Connors' e-mail indicated that he had concerns about Petitioner's operation, but not opposition. In his e-mail, Mr. Connors stated, "I personally, and professionally, do not think the Kline property needs anything more than buffering, reasonable hours of operation, and a little limitation on noise abatement."<sup>6</sup> Attachment 2 to the Staff Report (Exhibit 24(a)). The Planning Board rightly observed that "Staff had previously recognized these concerns, worked with the applicant to address them, and ultimately recommended approval with conditions. The Board concurred." Exhibit 24, p. 1.

Mr. Deutsch's concerns are a different story, and he remains strongly opposed to the petition. Mr. Deutsch lives at 20922 Brooke Knolls Road, abutting the southwest corner of the subject site. His faxed letter of October 6, 2011 (Exhibit 26) incorporates his letter to the Planning Board of September 13, 2011 (included in Attachment 2 to the Staff Report (Exhibit 24(a))). In that letter, Mr. Deutsch references four areas of concern – impact on the environment, effects on his quality of life, alleged unlawfulness of Petitioner's operation and impact on the property value of his home. The Hearing Examiner addresses each of those concerns below.

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<sup>5</sup> Although Mr. Deutsch characterizes his letter to the Board of Appeals as "Testimony," it is not testimony because the declarant elected not to appear at the hearing and therefore was not placed under oath or subjected to cross-examination. His fax (Exhibit 26) was nevertheless received into evidence as a letter and weighed accordingly. Mr. Deutsch's submission also attached an anonymous, unsigned letter, allegedly from another neighbor. As stated by the Hearing Examiner at the hearing, anonymous letters are not accepted as evidence in this type of proceeding. Tr. 4.

<sup>6</sup> The Hearing Examiner assumes Mr. Connors meant "limitation on noise," not "limitation on noise abatement."

**1. The Environment:**

As to the environment, Mr. Deutsch contends that Petitioner is storing toxic substances which have contaminated his well water, and that “asphalt residue, diesel fumes, dust, dirt and other by-products of [Petitioner’s] operation have created health problems for [his] family.”

Mr. Deutsch does not document any health problems suffered by his family, nor any causal relationship with Petitioner’s operation. Thus, there is no evidence on that point which can be addressed in this proceeding. With regard to his well water, Mr. Deutsch alleges bacterial contamination from water run-off, and he claims to have a lab test to support this allegation, but he has not produced any such lab tests into evidence. Nevertheless, Petitioner produced evidence from a licensed environmental engineer, Daniel Wilhelm, to refute Mr. Deutsch’s claims.<sup>7</sup> Tr. 105-120.

Mr. Wilhelm performed a “Phase I Environmental Site Assessment” of the property in conformance with the ASTM (American Society for Testing and Materials) standards, as well as applicable EPA (federal Environmental Protection Agency) standards. The full study is in the record as Exhibit 21(g). In his review of the site, the site visit and environmental databases, he didn't find any recognized adverse environmental conditions on the property; nor any adverse impacts from the subject property to adjacent properties. Tr. 111.

In Mr. Wilhelm’s opinion, based on his investigation and site assessment, neither the subject property nor the Applicant's operations pose any environmental threat to any adjoining property or to the neighborhood. Tr. 112.

The Hearing Examiner questioned Mr. Wilhelm about the allegation in Mr. Deutsch’s letter (Exhibit 26) that “. . .the contamination of my well water, according to Frederick Labs is consistent with e-coli, a typical source being runoff from exposed topsoil and the irregular drainage pattern of my yard is also consistent with alterations to the rear of J.B. Kline's property.”

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<sup>7</sup> Although Mr. Wilhelm’s license is from the State of Virginia, not Maryland, the Hearing Examiner found that he had

According to Mr. Wilhelm, he was unable to obtain a copy of the Frederick Labs report, and Mr. Steve Martin of Montgomery County Department of Environmental Protection (DEP) also did not have a copy. However, Mr. Wilhelm testified that, based on how potable wells are installed, “it would be very, very unlikely, and almost impossible for surface water contamination, and surface contamination to migrate to the level that the potable well is installed at.” Tr. 112-113. They are normally cased with solid pipe and then grouted to prevent such a happening. A concrete slurry is placed around the well shaft to prevent the migration of superficial runoff down into the well. He also noted that two colonies of e-coli is an extremely low number, and that it is very easy to achieve with improper sampling procedures. Tr. 112-114.

According to Mr. Wilhelm, the Montgomery County DEP concluded, as he did, that the assertion that it was impact from surface runoff was not valid. The other claim was a finding of chloroform, but Mr. Wilhelm noted that chloroform is a very common laboratory artifact, meaning that it's found in the labs that run analyses, and it's at very low levels. Hence, it could have been lab artifact from the lab that did the sample. Moreover, a lot of times, if there is a problem with a potable well, chlorine is used to shock it, and then it is purged. That chlorine can react and form chloroform in the subsurface. Tr. 114-115.

A report from Maryland Department of Environment (MDE) is in the record as Exhibit 21(k). An MDE inspection was conducted based on complaints from Mr. Deutsch and/or his wife. This inspection revealed “no observations of pollutants that could be picked up by stormwater associated with this industrial activity.” Exhibit 21(k). The County Department of Environmental Protection (DEP) also inspected the premises as a result of complaints from Mr. Deutsch. The DEP report is also in the record as part of Exhibit 24(b)(3). Steve Martin of DEP reported that during two site visits on March 11 and March 16, 2011, “DEP staff did not see any evidence that storm

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ample credentials to testify as an expert in environmental engineering and environmental site assessment.

water runoff was carrying debris/pollutants onto [the Deutschs'] property. E-mail dated August 2, 2011 from Steve Martin to Todd Brown (Attachment 4 to Exhibit 24(b)(3)).

Thus, the evidence received in this case overwhelming supports the finding that Petitioner's operation is not producing pollutants harmful to Mr. Deutsch's well water or to his family.

## **2. Quality of Life Impacts:**

As to impacts from Petitioner's operation on his quality of life, Mr. Deutsch complains about the unsightly visage of a commercial operation in this residential zone and the noise pollution which is an inherent part of a landscape contractor operation. Both the visual and noise concerns have been addressed by Petitioner's actions and by conditions recommended by the Planning Board in this case. The addition of more trees along the perimeter and a six-foot berm will reduce visibility of the operation from the surrounding residential neighborhood. In fact, the berm will block Mr. Deutsch's view of the landscaping operation (Tr. 126-131), and it will also help to attenuate the noise, according to the Technical Staff (Exhibit 24(a), p. 10). In addition, a condition has been recommended which will prohibit the use of tree chippers and splitters on site.

Mr. Deutsch admits that this will remove "the greatest offending operation," but he proclaims in bolded, all-cap print: **"THE INHERENT NOISE GENERATED FROM THIS TYPE OF BUSINESS IS INHERENTLY UNACCEPTABLE FROM A BUSINESS THAT ABUTT'S [SIC] A RESIDENTIAL NEIGHBORHOOD."** Exhibit 26. As the Hearing Examiner explained at the hearing, the Zoning Ordinance expressly forbids us from denying a special exception based solely on inherent adverse effects because Zoning Ordinance §59-C-1.31(c) provides that this particular type of use (*i.e.*, a landscape contractor) is permitted in the R-200 Zone by special exception. Zoning Ordinance §59-G-1.2.1 provides, "*Inherent adverse effects alone are not a sufficient basis for denial of a special exception.*" Whether or not a policy of allowing landscape contractors in an R-200 Zone is advisable is not for the Hearing Examiner or the Board



of Appeals to decide. Rather, we must follow the statutory dictates and determine whether there are any non-inherent characteristics of this particular use that either alone, or in conjunction with inherent characteristics, render the use incompatible. As will be further discussed in Part IV of this report, the only non-inherent characteristics of this site – the fact that it is in a special protection area and that it is close to single-family residences, have been adequately addressed by conditions recommended in this case, and they therefore do not warrant denial of the petition.

It is important to note, in this connection, that non-inherent site or operational conditions can result in the denial of a special exception for a landscape contractor, as occurred in the case of *Montgomery County, Maryland, et al. v. Melody Butler*, 417 Md. 271; 9 A.3d 824 (2010). This case is distinguishable from *Butler* on its facts, in that the subject site is more than twice as large as the site in *Butler*, leaving more room to arrange operations in a less intrusive manner, and the steps taken to attenuate noise should be more effective. These include installation of a berm, preclusion of the tree chipper and splitter, and arrangement of the truck circulation to eliminate backing up (with beepers) in the morning. Tr. 29-32.

By their nature, these cases turn on the factual scenario presented by the evidence, and the evidence here, including the evaluation of Technical Staff, the Planning Board, the Maryland Department of the Environment and Montgomery County's Department of Environmental Protection, in addition to Petitioner's experts, strongly supported approval of the petition.

### **3. Unlawfulness of Petitioner's Operation:**

Mr. Deutsch rightly claims that Petitioner's operation is currently in violation of the Zoning Ordinance because there is currently no special exception and one is required to operate as a landscape contractor in this Zone. Petitioner has been cited for this violation, and that Violation Notice is in the record as Exhibit 11. It instructs Petitioner to obtain a special exception or to cease operations as a landscape contractor. Petitioner thereafter filed this application for a special exception.

Petitioner currently has the following licenses: State of Maryland Construction License (Exhibit 12); MCFRS/Hazardous Materials Use Certificate (Exhibit 13); State of Maryland Home Improvement Contractor/Salesman License (Exhibit 14); and State of Maryland Pesticide Business License (Exhibit 15). The record reveals no violation notices other than the one calling for Petitioner to obtain a special exception

Thus, to the extent the record reveals unlawful activity on the site (*i.e.*, operating an landscape contractor business without a special exception), Petitioner is taking the appropriate steps to remedy that situation. If the special exception is denied by the Board of Appeals, Petitioner will not be permitted to operate this business on the subject site.

#### **4. Impact on Property Values:**

Finally, Mr. Deutsch complains that Petitioner's operation interferes with his ability to sell his home. Petitioner addressed this claim by producing the testimony of Ryland Mitchell, an expert in economic evaluation and economic impact analysis as it pertains to real estate appraisal. Tr. 83-104. His documented analysis has been entered into the record as Exhibit 21(j).

Mr. Mitchell compared sales activity and new home construction of the properties that surround the Kline Landscaping property with those that are in the same subdivision but are not immediately adjacent. He also gathered similar data for two other landscaping operations that had similar situations in terms of adjacent detached dwellings to determine whether there was a noticeable difference in price for homes that were immediately adjacent to the landscaping facility. He primarily focused on the stable market around the period of 2006.

Based on data comparing sales of abutting properties with the sales of other nearby, but not-abutting, similar properties, as well as his experience over the years in looking at many residential properties, Mr. Mitchell concluded that, as long as properties are appropriately, adequately

screened, and buffers provided, location bordering a landscape contractor shouldn't be a factor in the prices that people pay for these properties. Tr. 92-95.

Bearing in mind that there will be a storm water management facility where none currently exists on the subject site; that the setbacks proposed on the Kline property exceed those required in the zoning ordinance; that no customers will visit the property; that there are a limited number of vehicle trips being generated by the property; that there is extensive buffering of existing landscaping that will be supplemented by additional landscaping; and that there will be a buffering created by the erection of a six-foot earthen berm, Mr. Mitchell opined that the proposed special exception will not be detrimental to the economic value or development of surrounding properties or the general neighborhood. Tr. 98-100.

The Hearing Examiner recognizes that the small sample size of this study and the number of variables reduces the reliability of Mr. Mitchell's conclusions; however, there is no contradictory evidence in this record, and one can certainly conclude that there is no evidence from this data set that landscape contractor operations influenced the price of adjacent homes adversely. Since the data set included the subject site, as well as similar nearby facilities, and no contrary data was supplied by the opposition, the Hearing Examiner finds that Mr. Deutsch's claim of an adverse impact on the value of his property is not supported. Mr. Deutsch's fears are not supported by any expert evidence, and they are clearly outweighed by the expert testimony given by Mr. Mitchell in this case. As stated in *Moseman v. County Council Of Prince George's County*, 99 Md.App. 258, 265, 636 A.2d 499, 503 (1994), citing *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 191-93, 262 A.2d 499 (1970), "A denial of a special exception based solely upon generalized fears or unsupported allegations of adverse effect is arbitrary and legally unwarranted."

**Conclusion Regarding Community Concerns:**

The only member of the community to come forth with continued opposition in this case is Kevin Deutsch. All of the concerns raised by Mr. Deutsch have been discussed at length in this report. While some of them are certainly legitimate, such as his distress over noise, they can be appropriately managed by buffering and conditions limiting operations. Based on the evidence admitted in this case, the Hearing Examiner finds that the proposed special exception will not create undue traffic and will not adversely impact the environment. Parking on site is adequate for the equipment and vehicles expected on site. Customers will never visit the property. Noise from the proposed use will be significantly dampened by the extensive buffering between the subject site and the neighbors, by preclusion of the tree chipper and splitter, and by arrangement of the truck circulation to eliminate backing up (with beepers) in the morning. A significant amount of noise is part of the inherent nature of this kind of operation, as admitted by Mr. Deutsch. Of course, Petitioner will still be required to comply with the County's noise ordinance. On-site lighting is very limited and consistent with restrictions on lighting in a residential zone. The hours of operation are also consistent with past Board of Appeals conditions for landscape contractors. In sum, the Hearing Examiner finds that the proposed special exception, as conditioned, will be compliant with the requirements of the Zoning Ordinance.

Mr. Deutch's central complaint is that any landscape contractor operation should not be allowed in a residential zone because it is "inherently" incompatible. Exhibit. 26. By law, that cannot serve as the sole basis for denial of a special exception application.

**III. SUMMARY OF THE HEARING**

Petitioner called six witnesses at the hearing, Brian Kline for Applicant; Curt Schreffler, a civil engineer; Bill Landfair, a land planner; Craig Hedberg, a traffic engineer; Ryland Mitchell, a



real property appraiser; and Daniel Wilhelm, an environmental expert. No opposition appeared at the hearing.

### **A. Petitioner's Case**

#### **1. Brian Kline (Tr. 13-34; 121-123; 131-134):**

Brian Kline testified that he is the president and owner of the landscape contractor business. The business was begun on this site by his father in 1968 and has been in continuous operation at the subject property since then. He has a Maryland construction license, Maryland home improvement license, a Maryland pesticide applicators license, and a Maryland hazardous materials use certificate. Those are all the business licenses that are required to operate the business.

He offers lawn and landscape maintenance, landscape installation, and hardscape installation. No expansion of those services is proposed by this application.

The proposed hours and days of operation are, for office employees, Monday through Friday, 6:00 a.m. to 6:00 p.m., Saturday, 7:00 a.m. to 6:00 p.m.; field or crew employees, Monday through Friday 7:00 a.m. to 6:00 p.m., and Saturdays 8:00 a.m. to 4:00 p.m. The operation will be closed on Sunday. Exceptions to these hours of operation are made for snow removal and weather related emergencies.

[The Hearing Examiner asked Petitioner to file a separate Statement of Operations, for enforcement purposes, incorporating the specifics buried in Petitioner's Statement in support of the petition. Tr. 16-17.]

[Petitioner's counsel indicated that Mr. Deutsch didn't object to hours per se, but to backup beepers, which occur during the unloading of material, and the moving of materials on the site. Tr. 19-20.]

Mr. Kline agreed to all of the conditions recommended in the Planning Board's September 29, 2011 letter (Exhibit 24). Tr. 21. The proposed maximum number of employees is 25 in peak

season and 12 in off season. Peak season is the beginning of March through December. The off season would be January and February.

Mr. Kline further testified that his customers never visit the subject property, and the sale of plant material, garden supplies, or equipment is not proposed at the subject property. There will be three deliveries of supplies permitted per week, two trash pickups per week, two yard debris pickups per month, and one recycling pickup a week. They will all be from 8:00 a.m. to 4:00 p.m., the allowed delivery time, Monday through Friday. There will be no weekend deliveries.

The materials delivered and stored on the property include plants and manufacturer-bagged fertilizer, which is limited to 30-40 bags at a time, or the equivalent of one pallet, as well as mulch, top soil, yard trimmings, firewood, patio pavers, stone aggregate products, and packaged ice melt. The fertilizer and the ice melt are stored under cover. No pesticides or manure is stored on the property, nor is any hazardous waste stored on the property. No mulch manufacturing or composting takes place on the property. Tr. 22-24.

The following equipment is used in connection with the business: 12 trucks, three sales vehicles, nine trailers, two rubber tire loaders, two skid loaders, and one tree chipper which will not be used on the site, various lawn mowers, garden tools, string line trimmers, leaf blowers and snow plows, which will be attached to one of the permitted 12 trucks. This equipment is similar to equipment used in other landscape contractor businesses in Montgomery County. This type of equipment is inherent in a landscape contractor operation. Any noise generated by the use of this equipment, and the loading and unloading of materials, is also inherent in the landscape contractor operation.

The existing fuel tanks used for fueling of vehicles and equipment has been approved by the Montgomery County Department of Fire and Rescue Services. The hazardous materials use certificate is in the record as Exhibit 13. Tr. 25-26.

No new buildings are proposed in this application. There will be construction of a berm, which was suggested by the community, and installation of the storm water facility that has been approved by Montgomery County, removal of impervious areas to the rear of the property, removal of an existing metal storage building, planting of trees around the perimeter of the property, installation of wheel stops in the parking lot to identify the specific parking spaces, and removal of a small portion of the office building to comply with the 50-foot setback requirements. Tr. 27.

Mr. Kline described a typical day on the site: He and office employees will pull in front of the large maintenance storage building. The rest of my employees, who arrive at 7:00, will park in the employee parking area near the entrance to the site. Those employees will then walk down to the office areas, get their instructions for the day as to where they will be going to work. They'll get in their vehicles, which will be parked to the east of the maintenance building on the gravel. They then leave the property for the day. At the end of the day, the same employees will come back in. They will then either drop off excess mulch or topsoil into the appropriate bins. The maintenance crews will pull to the fuel tanks on the north side of the property. They will then come around towards the center of the property, drop off any yard debris or miscellaneous trash. They will pull back and park wherever their designated space is, either in the south or the north of the property. It's designed so that in the evening the trucks can be loaded with the material that they need for the next day, and once they've had their direction of where they're going, they can just immediately leave the property without having to drive around at earlier hours. It avoids backup beeper noises in the morning. Tr. 29-32.

Mr. Kline believes the parking that is proposed in this application will be sufficient for the number of employees because it has worked fine for many years. No customers come to the site. Exhibit 21(1) is parking survey in which he counted the amount of employees that came to the site

every day, as well as the amount of vehicles that came to the site every day. During that whole time of the survey, he has never needed all of the 12 marked parking spaces for his employees. Tr. 33.

Mr. Kline had two meetings with the neighbors. Eleven appeared at the first one and three at the second meeting when he showed a revised plan that addressed the concerns expressed at the first meeting. The only notice of violation he ever received on the site was for failure to have a special exception (Exhibit 11), which led to this application. If the application is approved, Mr. Kline stated that he will operate in compliance with all applicable laws. Tr. 34.

Mr. Kline further testified that the photos included in Exhibits 8(a) – (l) accurately portrayed the site as it exists and are accurately captioned. Tr. 122. As to the sign depicted in Exhibit 8(a), Mr. Kline's attorney indicated that Petitioner intends to seek a sign variance. Tr. 122-123.

Mr. Kline identified photos of the site in the Technical Staff report and confirmed that they accurately depict the site. Tr. 131-132. He also testified that the roll-off containers referenced in Mr. Deutsch's letter have been removed. There were some containers at one point kept there, just helping a friend out, but they had been taken away as of two years ago. There are still two remaining containers, which are identified on the site plan to be used as part of the operation for trash and for yard waste and trimmings. Tr. 133-134.

2. Curt Schreffler (Tr. 35-52; 124):

Curt Schreffler testified as an expert in civil engineering. He stated that his involvement with the property has been the development of the civil engineering plans for the site. Using the rendered site plan (Exhibit 21(d)), Mr. Schreffler noted that all operations outside the 50-foot setback line are to be removed or relocated. In the south central portion of the property, a metal storage shed will be removed because it violates the 50 foot setback line. The area where the shed now stands will become green space, and be heavily landscaped with actually three rows of evergreen trees.



Along the entire north and west edges of the property, there are several rows of mature evergreens, white pines. Petitioner will supplement that with additional evergreens. The south side is a mix of evergreens and deciduous trees. Again, that's being supplemented. In addition, in the west and central portion of the property, as illustrated on this plan, there is a six-foot high earth berm proposed, that basically surrounds the material storage staging area to provide even another layer of buffering and some noise attenuation for the property in response to concerns of the neighbors.

The darkest green shaded area shown around the perimeter of the property, on the north, west and south sides, represents the existing tree line. The individual little pine tree symbols indicate the proposed trees. It's primarily one additional row of evergreens, except on the south side, the south central portion of the property. In addition to removing the metal shed, there will be two to three rows in that area. The whited out southeast corner is Mr. Kline's personal residence. There is a fence that delineates the residential property.

The Zoning Ordinance provides that lighting levels along the side and rear of the lot lines must not exceed 0.1 foot candles. Exhibit 21(c) analyzed each of the proposed lights and locations, and none of the lights exceed the standard set forth by §59-G-1.23. No new buildings are proposed; one building will be removed, and a corner of a building.

The site is served by a private sewer/septic system, private well. Pepco provides the electric, and Washington Gas provides gas to the site. All utilities exist and are adequate. Tr. 42.

Mr. Schreffler further testified that to carry out the Planning Board recommendation that DPS well and septic division should evaluate the septic capacity for the site to determine if it was adequate, the Department of Permitting Services conducted septic percolation tests on the property to establish an acceptable septic area. All those percolation tests passed, were acceptable. He introduced a letter, dated October 6, 2011, from John Hancock of Permitting Services (Exhibit 28),

indicating satisfactory percolation. It indicates passing percolation tests and then approval for a house with a maximum of three bedrooms, which is what the existing house has now, and a landscape business for 26 employees. Tr. 42-43.

According to Mr. Schreffler, there are no storm water management facilities in place on the property. A water quality plan has been approved by Montgomery County Department of Permitting Services, as indicated in Exhibit 27. That plan consists of a bio-filtration facility to capture and treat runoff from the impervious areas on site. It will be located in the south center portion of the site, and it will meet current standards, set by Maryland and Montgomery County for environmental site design. Tr. 44. The Planning Board officially approved the water quality plan at their hearing when they recommended approval of the special exception; however, it will not be signed off until their legal department approves the form. The Hearing Examiner agreed to leave the record open for 10 days to receive it. Tr. 45-47.

Mr. Schreffler testified that the impervious area will be greatly reduced as a result of the new design of the site. The entire perimeter of the operations area of the northern and western perimeter, which is currently impervious mix of gravel, will be eliminated, as indicated on the impervious area schematic (Exhibit 21(i)). The area indicated with cross-hatching on the north and west sides is all being removed and replaced with landscaping, and the berm, as well as significant impervious area on the south central portion of the site where the existing metal garage is being removed. The impervious percentage will be reduced from 48.62 percent to 34.06 percent, which is a 29.9 percent reduction. In addition, Petitioner will be providing storm water management where none exists today. Tr. 48-49.

Zoning Ordinance §59- C-18.242 indicates that the overlay zone's restrictions do not apply because Petitioner is not using public sewer. Technical Staff agreed that Petitioner had reduced impervious area as much as possible. Tr. 49-50. In Mr. Schreffler's opinion, the proposed special

exception will be served by adequate public services and facilities, including well and septic, storm water, other utilities, and the proposed special exception will be consistent with the approved water quality plan. Tr. 50.

Areas for parking and moving of trucks and equipment and other site operations are located at least 50 feet from any property line, and the site plan provides for compliance with all zoning standards for the R-200 zone. Mr. Schreffler also opined that an adequate area for parking is provided on site, given the number of trucks and vehicles proposed in the special exception as shown on the parking plan. Tr. 50-51.

According to Mr. Schreffler, Petitioner will have to obtain permits to do the proposed renovation work, and a raze permit to remove the metal building, but neither of those permits trigger subdivision, so the Board of Appeals in this case will be the body making the determination of the adequacy of public facilities. Tr. 51-52.

Mr. Schreffler further testified that the existing entrance sign is unlighted and measures six feet by four and a half feet. It is on a busy State highway, just south of a shopping center that has very large and ample signage. The subject site is just outside of the town limits of Laytonsville with several commercial properties, and across the street from another landscape facility, so in his opinion, the existing sign is very much in character with other signs along this State highway – “it does not jump out at you . . .” Tr. 124. [The Hearing Examiner gave Petitioner leave to file an affidavit regarding the sign from its land use planner, with 10 days allowed for public comment. Tr. 125-126.]

3. William Landfair (Tr. 53-75):

William Landfair testified as an expert in land planning. In his opinion, the proposed special exception would be in conformance with the Master Plan, and it meets or exceeds the development standards for the applicable zone, which in this case is the R-200 Zone. It also will

satisfy all of the special exception criteria for landscape contractors, as well as the general conditions that apply to all special exceptions. Tr. 54-55.

Mr. Landfair noted that in previous special exception cases, notably S-2695 and S-2711, the hearing examiner has identified the inherent characteristics for landscape contractors as including buildings, structures, and outdoor areas for the storage of plants and garden related equipment; outdoor storage of mulch, soil, and other landscaping materials in bulk or in containers; on site storage of business vehicles and equipment, including small trucks and landscaping trailers, traffic associated with trips by employees, by other visitors to the site, by suppliers; trips by employees who are engaged in off site landscaping activities; parking areas for the customers and for staff; dust and noise associated with the movement of landscaping products; and the loading and unloading of landscaping equipment; as well as the hours of operation.

In Mr. Landfair's opinion, this particular special exception is fully consistent with the inherent characteristics of a landscape contracting business, and the operation will be compatible with the residential neighbors. The additional landscaping and screening, with the additional berm that will be added, will provide appropriate noise attenuation. Petitioner will be reducing the imperviousness on the site and providing for a storm water management facility where none exists today. No new buildings are proposed, and the existing buildings will be well screened from the surrounding neighborhood. Minimal exterior lighting is proposed. Lights will be shielded to ensure that the lighting level at the property line will not exceed 0.1 foot candles, nor will the source point of the light be visible. In his opinion, there are no non-inherent adverse effects associated with this use, and no adverse effects created by any unusual site characteristics. Tr. 56-57.

According to Mr. Landfair, the closest residence is about 25 feet from the northern property line. In response to a question by the Hearing Examiner, Mr. Landfair conceded that the fact that

this operation is in a special protection area and that it is within 25 feet of a single-family detached home are non-inherent site conditions. Nevertheless, he feels that Petitioner's proposal handles the situation well and appropriately reduces its adverse effects. The steps that are being taken to minimize the impact far exceed the minimum standards. Tr. 58-60.

Mr. Landfair described the neighborhood. The primary uses are residential. There is a large landscape business (19-acre) located on the opposite side of the road, and there are several special exception uses in the neighborhood, including a child daycare facility, as well as a golf course. But for the most part, the surrounding area is residential in character, large lot subdivisions. Tr. 60-61.

Mr. Landfair noted that the buildings on the site are all one-story structures. They do vary in height between 10 feet and 20 feet. The height limit in the zone is 35 feet, so they're well under the height limitation prescribed by the R-200 zone. These are not residential appearing buildings, but certainly they do have an appearance that is consistent with secondary and accessory structures that are often found both in single family residential as well as agricultural zones. In his opinion, the size, the scale, the overall mass of these buildings, even their architectural elements and the siding and materials used are consistent and compatible with the character of the surrounding area, and the special exception will not adversely affect or change the present character of future development of the surrounding neighborhood. Tr. 62-63.

Mr. Landfair further testified that the project complies with the standards and requirements of the R-200 Zone. The minimum area requirements have been met. The areas for the parking and loading of trucks and equipment, as well as the other on site operations all will maintain applicable setbacks. Adequate screening and buffering is provided to protect the adjoining uses from any of the objectionable effects of the operations. The number of motor vehicles and trailers for equipment supplies are going to be limited by the statement of operations. Adequate parking is provided. Adequate storage is also provided. There will be no on site sale of plant materials or



garden supplies and equipment. There will be no visits by customers, and the hours of operation will be also limited by the statement of operations. Tr. 63-64.

According to Mr. Landfair, the project complies with the parking regulations set forth in Section 59-E of the code, except with respect to the requested waivers. That includes the size of the spaces themselves, as well as the provision of handicapped spaces. There are eight waiver requests:

1. The first waiver is from Section 59-E-2.21, which pertains to the arrangement and marking of spaces. Given the size of this parking facility, because it is so small, no directional signage is needed, nor is it possible or practical because it is paved in gravel, to actually delineate the individual spaces. The wheel stops that are proposed for those spaces will be more than sufficient.
2. The second waiver is from Section 59-E-2.4, relating to access and circulation. It calls for each space to have access to a public street or alley, and have interior drive isles, but the circulation will be more than sufficient for this site, and it will be safe and efficient. Trucks and vehicles can circulate around the site without the need to back up.
3. The third waiver is from section 59-E-2.41, which relates to the widths of driveways. The code requires a 10-foot drive isle for one-way movement, and a 20-foot drive isle for two-way movement. Two-way movement on the existing driveway is limited. The width of this driveway is between 12 and 14 feet. However, no customers are visiting the property. The employees are typically arriving at the same time, or departing at the same time. On those infrequent occasions when two vehicles may be on the driveway at the same time, there is ample room to the side of the driveway to accommodate these vehicles without affecting safety.
4. The fourth waiver is from Section 59-E-2.42, which calls for the provision of pedestrian walkways. Because of the size of the parking area, they are not necessary. The parking area is only to be used by employees who are familiar with the area. It's not to be used by the general public. If you added the walkways, it might contribute to a commercial appearance of the parking area, which might detract from the character of the site, particularly from the road.
5. The fifth waiver is from Section 59-E-2.43, which calls for separation from walkways with curbing. Again, there are ample setbacks, and mature landscaping which separate this parking area from the surrounding site. There is no sidewalk along this side of the roadway to connect a sidewalk, and a sidewalk would, again, contribute to a commercial appearance.
6. The sixth waiver is from section 59-E-2.6, regarding lighting, to ensure that there is adequate lighting, particularly at night. The majority of the work done on site is by employees. It is done primarily during daylight hours. There is only a small percentage of work that might be done during the winter months when employees might be on the site when it is dark. On balance, the installation of lighting would not change the visibility dramatically, or help the employees that much, given their limited use of the facility during the night. Again, it would contribute to a commercial appearance of the site. The parking area has been in existence for quite some time, and has operated well without lighting.

7. The seventh waiver is from Section 59-E-2.74, requiring planting islands. To accommodate that requirement for this parking facility would mean enlarging it considerably, which would create greater land disturbance, and would, again, increase visibility from the roadway. The facility is almost completely surrounded by landscaping, and there would be no benefit to adding planting islands.

8. The eight and last waiver, is from Section 59-E-2.83, requiring internal landscaping and screening. The goal for this requirement is to ensure shading of the parking area and screening in residential areas, but there are sufficient mature trees surrounding the parking area that it is not necessary to provide any additional internal landscaping, and the site is well screened, so it won't adversely impact the surrounding residential area.

In Mr. Landfair's opinion, the requested waivers are consistent with the standards for the waiver requirements. Tr. 64-69.

He also opined that the proposed special exception will not result in a nuisance because of traffic, parking, noise, or type of physical activity. The design, scale and the intensity of the use, as conditioned, will not conflict with the neighborhood, factoring in that there is a nearby large landscape contracting business, considering the setbacks of the nearby single family homes, and the screening of this facility. Petitioner will be adding additional screening, including a berm, which will also help to attenuate any noise coming from the property. Petitioner will also reduce the amount of imperviousness on the site and add storm water management where none exists today. The existing facilities, including parking, will be used and Petitioner will not be adding any additional traffic to the roadways. Tr. 69-70.

Mr. Landfair further testified that the special exception will be consistent with the general plan for the physical development of the district, including the Upper Rock Creek Master Plan area. The Master Plan does not offer much in terms of general recommendations for special exceptions. However, it does support the existing R-200 zone for the property. This is a zone that allows landscape contractors as special exceptions. The property is located within the Upper Rock Creek watershed, and a portion of the site is within a special protection area. As such, existing water resources in special protection areas, including also forest areas are deemed to be of high quality

and unusually sensitive. However, as shown on the NRI/FSD, there are no streams, wetlands, or forests on the site. The property is also located within the environmental overlay zone, as described by the Master Plan. However, the requirements for this zone do not specifically apply to the property, because it is not served by community sewer services. It is served by a private septic system. The Master Plan talks about minimizing imperviousness as one of the best ways of assuring protection of the sensitive water resources in the area, and Petitioner has done just that for this property, as well as the provision of a bio-filtration facility. Tr. 70-71.

According to Mr. Landfair, the proposed special exception will be in harmony with the general character of the neighborhood in that it is not introducing any new facilities or activity to the site, and generous setbacks and screening for the facilities are proposed. As such, the proposed special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties, or the general neighborhood at the subject site. Any noise, vibration, fumes, odors, dust and illumination or glare produced on site will be inherent to this type of use. There's no mulch manufacturing on site, and the tree chipper will only be used at job sites. Light fixtures, will employ a cut-off type light fixture to minimizes the spread of light. Extensive landscaping is going to be provided. This will be effective screening. And there is no material stored on site which is classified as hazardous waste, nor will there be any on site storage of pesticides, chemicals, or manure. Tr. 71-73.

This use has existed at this location for many years. If it's approved as a special exception, it will not increase the number, intensity or scope of special exception uses sufficiently to adversely affect the area. The proposed special exception also will not adversely affect the health, safety, security, morals or general welfare of residents, visitors, or workers in the area. The special exception will be served by adequate public facilities. There are adequate electric, telephone and gas lines located within the adjacent road right-of-way. The closest Police and Fire stations are four

miles and a quarter of a mile respectively from the property, which is an acceptable distance. Tr. 74.

In response to a question from the Hearing Examiner, Mr. Landfair noted that Technical Staff defined the neighborhood much more narrowly than he did. Essentially, they're defining it to include only those properties that are immediately adjacent to the subject property, whereas, he defined it to extend on the north up to Sundance Road, west to Warfield Road, south to Dorsey Road, and east to the east side of Olney Laytonsville Road. He did so to make sure to include all properties that possibly could be within sight and sound, or otherwise would have residents, visitors or employees that would pass by the property on any given day. Tr. 74-75.

4. Craig Hedberg (Tr. 76-82):

Craig Hedberg testified as an expert in transportation planning and traffic engineering. He had a traffic count taken at the subject site, which was served by a single driveway onto Maryland Route 108, a major highway. He then determined the existing highest peak hour of site trips, which turned out in this case to be nine peak hour trips in the evening peak hour. Under the County's policies, a full local area transportation review (LATR) is required when there will be more than 29 peak hour trips generated, and the maximum peak hour trips that were counted here were nine. That's well below the threshold where there would have to be an external traffic analysis conducted. The peak hour was the same for 6:30 to 7:30 and also 6:45 to 7:45 in the morning, where seven trips were counted. And then in the afternoon, it was at the very early part of the peak period, 4:00 to 5:00 p.m. In making this count, Mr. Hedberg counted as if this were a newly created operation on the site.

Mr. Hedberg further testified that the second part of the County transportation test is the policy area mobility review (PAMR). Because this site is located in a rural area, there is no PAMR

trip mitigation requirement. He opined that under both aspects of the County's transportation test, this site doesn't require any further analysis and meets the criteria of both.

Even assuming the worst case scenario, that all the workers coming and going and getting in their trucks, and all leaving in one peak hour, the maximum trips it could generate would be 27 trips, which would still be below the trigger for the local area transportation review.

Mr. Hedberg opined that, in terms of the traffic impact of the special exception, the proposed operation will be safe and adequate for vehicular and pedestrian circulation. It's an existing operation, and there's no retail operation. So there will not be customers attracted to the site. It's well laid out, and there is a systematic way of getting ready for the next day, the way that the trucks circulate and load, et cetera. It's an adequate and safe operation. This proposed operation would not have an adverse impact on the transportation facilities of the area.

5. Ryland Mitchell (Tr. 83-104; 126-131):

Ryland Mitchell testified as an expert in economic evaluation and economic impact analysis as it pertains to real estate appraisal. He is a member of the firm of Lipman, Frizzell and Mitchell, LLC, and his analysis has been entered into the record as Exhibit 21(j).

Mr. Mitchell compared sales activity and new home construction of the properties that surround the Kline Landscaping property with those that are in the same subdivision but are not immediately adjacent. He also gathered similar data for two other landscaping operations that had similar situations in terms of adjacent detached dwellings to determine whether there was a noticeable difference in price for homes that were immediately adjacent to the landscaping facility. He primarily focused on the stable market around the period of 2006.

Mr. Mitchell noted the sale immediately on the northern border of the property at 6800 Olney Laytonsville Road (the home that's 25 feet from the property line). The property is long and narrow in shape. It extends all the way back for the entire depth of the Kline property. It sold in

March of 2006 for \$685,000. It was just built in 2004, which he considered to be another indication that the person who owned that property chose to build a new home immediately adjacent to the Kline property (In addition to looking at sales and what properties sold for, Mr. Mitchell also looked at actions by individuals in constructing homes).

The second sale Mr. Mitchell noted was an older home that is on the west side of the property at 6838 Warfield Road. That home was built in 1987, so right about the time or shortly after the Kline operation began, sold for \$554,000. It's a smaller and older house than the one at 6800 Laytonsville Road, and it's on a smaller lot. And the relationship of the price seemed reasonable for those differences.

The third sale is one that is to the south of the subject site, but does not border the property like the first two. It is at 20929 Brook Knolls Road. That house sold in January 2007 for \$710,000. That house was built in the mid-1990s and is larger than both of the other two houses. It's land area is between the size of the two. Mr. Mitchell opined that these three sales were indicative that being located immediately adjacent to the Kline property didn't result in any significant difference in market perception. Tr. 87-91. Mr. Mitchell agreed with the Hearing Examiner's comment that because of all the variables in real estate transactions, it's hard with a sample of that size to reach a conclusion. For that reason, he looked at other properties as well. Tr. 91-92.

The two other developments that Mr. Mitchell looked at were Gazebo Gardens, which is just to the south of Mr. Kline's property on MD 108, and the old Ruppert Nurseries, on New Hampshire Avenue in the Ashton area .

Based on data comparing sales of abutting properties with the sales of other nearby, but not-abutting, similar properties, as well as his experience over the years in looking at lots of residential properties, Mr. Mitchell concluded that, as long as properties are appropriately, adequately



screened, and buffers provided, location bordering a landscape contractor shouldn't be a factor in the prices that people pay for these properties. Tr. 92-95.

Bearing in mind that there will be a storm water management facility where none currently exists on the subject site; that the setbacks proposed on the Kline property exceed those required in the zoning ordinance; that no customers will visit the property; that there are a limited number of vehicle trips being generated by the property; that there is extensive buffering of existing landscaping that will be supplemented by additional landscaping; and that there will be a buffering created by the erection of a six-foot earthen berm, Mr. Mitchell opined that the proposed special exception will not be detrimental to the economic value or development of surrounding properties or the general neighborhood. Tr. 98-100.

Mr. Mitchell further testified that he took the photos entitled "April 6, 2011" in the Technical Staff report, and he identified them. He explained that some of them will be impacted, if the special exception is improved, by the installation of the berm and the additional landscaping. For example, the view of Mr. Deutsch's property would be obscured by the landscaping and the new berm Tr. 126-131.

6. Daniel Wilhelm (Tr. 105-120):

Daniel Wilhelm testified as an expert in environmental engineering and environmental site assessment. He prepared an environmental assessment of the property which is in the record as Exhibit 21(g).

Mr. Wilhelm performed a phase one environmental assessment in conformance with the ASTM standards, as well as EPA's all appropriate inquiry standards. In his review of the site, the site visit and environmental databases, he didn't find any recognized adverse environmental conditions on the property; nor any adverse impacts from the subject property to adjacent properties. Tr. 111.

In Mr. Wilhelm's opinion, based on his investigation and site assessment, neither the subject property nor the Applicant's operations pose any environmental threat to any adjoining property or to the neighborhood. Tr. 112.

The Hearing Examiner questioned Mr. Wilhelm about the allegation in Mr. Deutsch's letter (Exhibit 26) that "...the contamination of my well water, according to Frederick Labs is consistent with e-coli, a typical source being runoff from exposed topsoil and the irregular drainage pattern of my yard is also consistent with alterations to the rear of J.B. Kline's property."

Mr. Wilhelm was unable to obtain a copy of the Frederick Labs report, and Mr. Steve Martin of Montgomery County Department of Environmental Protection (DEP) also did not have a copy. However, Mr. Wilhelm testified that, based on how potable wells are installed, "it would be very, very unlikely, and almost impossible for surface water contamination, and surface contamination to migrate to the level that the potable well is installed at." Tr. 112-113. They are normally cased with solid pipe and then grouted to prevent such a happening. A concrete slurry is placed around the well shaft to prevent the migration of superficial runoff down into the well. He also noted that two colonies of e-coli is an extremely low number, and that's very easy to achieve with improper sampling procedures. Tr. 112-114.

According to Mr. Wilhelm, the Montgomery County DEP concluded, as he did, that the assertion that it was impact from surface runoff was not valid. The other claim was a finding of chloroform, but Mr. Wilhelm noted that chloroform is a very common laboratory artifact, meaning that it's found in the labs that run analyses, and it's at very low levels. So that could have been lab artifact from the lab that did the sample. Moreover, a lot of times, if there is a problem with a potable well, chlorine is used to shock it, and then it is purged. That chlorine can react and form chloroform in the subsurface. Tr. 114-115.

[Petitioner's attorney noted that a report from Maryland Department of Environment is in the record as Exhibit 21(k). There were inspections conducted by MDE and they concluded that there was no environmental runoff hazard on the property that was affecting the Deutsch's property. The County Department of Environmental Protection report is also in the record as part of Exhibit 24(b)(3). They inspected the property as well, both for noise and for the other allegations of impacts to the Deutsch's well. During the two previous site visits on March 11 and on March 16, it is noted in the report, DEP staff did not see any evidence that storm water runoff was carrying debris or pollutants onto their, meaning the Deutsch's property. Tr. 116-117.]

Mr. Wilhelm noted that Mr. Kline was not cited for a noise violation. Mr. Deutsch and/or his wife complained about the tree chipper, but Mr. Kline has agreed not to use the tree chipper on his property any longer. In the Technical Staff report, at page 10, Staff indicates that he talked with the inspector from Montgomery County Department of Permitting Services, who visited the property site and determined that there was no objectionable noise. Tr. 118.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed use will successfully avoid significant non-inherent adverse effects on the community and will meet the

general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

#### **A. Inherent and Non-Inherent Adverse Effects**

The standard for evaluation prescribed in Zoning Ordinance § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a landscape contractor use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff describes the inherent characteristics of a landscape contractor as including (Exhibit 24(a), p. 7):

- (1) buildings and structures, as well as outdoor areas for the storage of plants and gardening-related equipment;
- (2) outdoor areas for the storage of mulch, soil, and other landscape materials, in bulk or in containers and the dispensing of fuel for the landscaping trucks, lawn mowers, etc.;
- (3) on-site storage of business vehicles and equipment including small trucks and landscaping trailers;
- (4) traffic associated with trips to the site by employees, and suppliers;
- (5) trips to and from the site by employees engaged in off-site landscaping activities;
- (6) adequate parking areas to accommodate staff;
- (7) dust and noise associated with the movement of landscape products and the loading and unloading of landscape equipment; and
- (8) long hours of operation.

Technical Staff concluded (Exhibit 24(a), pp. 7-8):

The basic operation of the proposed landscape contractor business, including the arrival and departure of employees and the loading and unloading of supplies and equipment for off-site operations, are typical of a landscape contractor operation and should be considered inherent to the proposed use. As a general matter, staff believes that most of the activities associated with the proposed use qualify as inherent and as being essential to the nature of a landscape contractor operation.

The Hearing Examiner agrees with Staff's conclusion, but saying that "most of the activities associated with the proposed use qualify as inherent" is not quite the same as finding that there are no non-inherent adverse effects. In fact, the Hearing Examiner believes that there are non-inherent characteristics of the site, in that it is in a special protection area and it is located rather close to single-family dwellings. Petitioner's land planner, William Landfair, candidly conceded that the location of this operation in a special protection area is a non-inherent characteristic, although he argued that it is not uncommon to have landscape contractors in close proximity to single-family dwellings in the R-200 Zone. Tr. 58-60. In any event, both of these characteristics can and have been appropriately addressed by screening and conditions limiting operations, as discussed at length in Part II. of this report. The Hearing Examiner therefore concludes that the inherent and non-inherent adverse effects caused by the physical or operational characteristics of the proposed use on this site do not preclude it from meeting zoning requirements.

Thus, the Hearing Examiner agrees with Technical Staff's conclusion that none of these effects warrant denial of the proposed special exception.

Based on the evidence admitted in this case, the Hearing Examiner finds that the proposed special exception will not create undue traffic and will not adversely impact the environment. Parking on site is adequate for the equipment and vehicles expected on site. The hours of operation will be limited by condition to prevent late-night activity, and customers will never visit the property. All buildings are limited to a single story. Noise from the proposed use will be significantly dampened by the extensive buffering between the subject site and the neighbors, by preclusion of the tree chipper and splitter, and by arrangement of the truck circulation to eliminate backing up (with beepers) in the morning. A significant amount of noise is part of the inherent nature of this kind of operation, but Petitioner will still be required to comply with the County's noise ordinance. On-site lighting is very limited and consistent with restrictions on lighting in a residential zone. The hours of operation are also consistent with past Board of Appeals conditions for landscape contractors.

In sum, the Hearing Examiner finds that the proposed special exception, as conditioned, will be compliant with the requirements of the Zoning Ordinance. While there may be non-inherent effects, they do not warrant denial of the petition.

## **B. General Standards**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

### **Sec. 59-G-1.21. General conditions:**

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*



*(1) Is a permissible special exception in the zone.*

Conclusion: A landscape contractor is permitted by special exception in the R-200 Zone, pursuant to Zoning Ordinance §59-C-1.31(c).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.30.00, as detailed in Part IV. C., below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property in question is subject to the 2004 Upper Rock Creek Area Master Plan. The Plan makes no specific recommendations for this property or for this portion of the planning area. Exhibit 24(a), p. 4. Technical Staff notes that the Master Plan seeks to reduce imperviousness and concludes that "The proposed special exception use is consistent with the Upper Rock Creek Area Master Plan." Exhibit 24(a), p. 5. Moreover, the Master Plan (pp. 93-94) approves the R-200 Zone for the subject area, and the R-200 Zone permits landscape contractors as special exceptions. For this reason and for those set forth in Part II. D. of this report, the Hearing Examiner finds that the proposed special exception is consistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Technical Staff found that the design, scale and intensity of the proposed special exception will not be in conflict with the general character of the neighborhood for the following reasons (Exhibit 24(a), p. 10):

It is located opposite a very large landscape operation, is exceptionally well screened, and proposes additional landscape screening, the provision of an earth berm to attenuate noise, the elimination of certain operations, a reduction in impervious surface and the provision of new storm water management facilities. The proposal eliminates an existing structure and will continue use of existing parking facilities. It will not have an impact on population density or result in an increase in vehicular traffic.

The Hearing Examiner so finds for the reasons stated by Technical Staff. This standard must be read in conjunction with the fact that landscape contractors are permitted in the R-200 Zone in spite of the fact that they have certain inherent characteristics that are clearly more commercial than residential. With that in mind, the subject proposal minimizes any adverse effects produced by its inherent operational characteristics.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons stated in response to the previous subsection and those set forth in Part II. E. of this report, the evidence supports the conclusion that the proposed use, as limited by recommended conditions and recommended buffering, would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The proposal meets or exceeds all the Zoning Ordinance Development Standards, and the preponderance of the

evidence refutes the claims of a neighbor that the environment would be adversely affected and his property value diminished, as discussed at length in Part II. E. of this report.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: A certain amount of noise and other activities are inherent in the operation of a landscape contractor business; however, as noted by Technical Staff (Exhibit 24(a). p. 10), those impacts will be minimized on this site:

There will be no mulch manufacturing on-site and no storage at any time of material classified as hazardous waste, pesticides, chemicals or manure. An inspector from Montgomery County Department of Permitting Services visited the property site and determined that there was no objectionable noise. A tree chipper previously used on the site will now only be used at job sites and not on the property. Cut-off light fixtures will replace the existing lighting on the premises and there will be no additional lighting. Additional screening will surround the property and a berm will be constructed in the rear yard in order to attenuate any noise.

The Hearing Examiner would add that noise will be further reduced by arrangement of the truck circulation to eliminate backing up (with beepers) in the morning. Moreover, hours of operation will be limited by condition to prevent late-night activity, and customers will never visit the property. Given these circumstances, the Hearing Examiner finds that this provision has been satisfied.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There are only two other special exceptions in the area according to Technical Staff. Exhibit 24(a), p. 11. The evidence thus supports the conclusion that the proposed special exception would not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely. Moreover, as previously discussed, the proposed special exception use is consistent with the recommendations of the Master Plan.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. No hazardous material, including pesticides and chemicals, will be stored on-site and no customers are permitted on-site. Allegations of harm to the environment were addressed at length in Parts II. C. and E. of this report, and the Hearing Examiner found those allegations to be unsupported in the evidence.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*  
(i) *does not require approval of a new preliminary plan of subdivision; and*

*(ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*

*then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision at the present time, and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities, as discussed in Parts II. B. 5. of this report.

The adequacy of transportation facilities was addressed at the hearing by Craig Hedberg, Petitioner's expert in transportation planning and traffic engineering. Tr. 76-82. Under the County's policies, a full local area transportation review (LATR) is required when there will be more than 29 peak hour trips generated. Because the maximum number of peak hour trips counted here was nine, the count fell well below the threshold where there would have to be an external traffic analysis conducted. Mr. Hedberg further testified that because this site is located in a rural area, there is no PAMR trip mitigation requirement. He opined that under both

aspects of the County's transportation test, this site doesn't require any further analysis and meets the criteria of both.

As to other public facilities, Mr. Landfair testified that there are adequate electric, telephone and gas lines located within the adjacent road right-of-way. The closest Police and Fire stations are four miles and a quarter of a mile respectively from the property, which is an acceptable distance. He concluded that the special exception will be served by adequate public facilities. Tr. 74.

Technical Staff also listed the adequate public facilities that are available to the site, and noted that the proposed use does not require public water or sewer services, as the site is served by private on-site well and septic systems. Exhibit 24(a), pp. 11-12. The Hearing Examiner concludes that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Mr. Hedberg opined that the proposed operation will be safe and adequate for vehicular and pedestrian circulation. Technical Staff agreed with this conclusion, finding that no LATR or PAMR review is required, and “that the proposed landscape contractor business under the subject special exception application will have no adverse affect on area roadway conditions.” Exhibit 24(a), p. 5. Based on the evidence of record, the Hearing Examiner finds that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

### **C. Specific Standards: Landscape Contractor**

The specific standards for a landscape contractor are found in Code § 59-G-2.30.00. The Technical Staff report and the Petitioner’s written evidence and testimony provide sufficient



evidence that the proposed landscape contractor use would be consistent with these specific standards, as outlined below.

**Sec. 59-G-2.30.00 Landscape Contractor.**

*This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a wholesale or retail horticultural nursery, or a mulch/compost manufacturing operation. If a combination of these uses is proposed, the Board opinion must specify which combination of uses is approved for the specified location.*

Conclusion: The landscape contractor use is not proposed in combination with a retail horticultural nursery or a mulch/compost manufacturing operation. As is documented elsewhere in this report, this use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors, mainly because it will be well-buffered from its neighbors. William Landfair opined that the proposed special exception will not result in a nuisance because of traffic, parking, noise, or type of physical activity. The design, scale and the intensity of the use, as conditioned, will not conflict with the neighborhood, factoring in that there is a nearby large landscape contracting business, considering the setbacks of the nearby single family homes, and the screening of this facility. Petitioner will be adding additional screening, including a berm, which will also help to attenuate any noise coming from the property. Petitioner will also reduce the amount of imperviousness on the site and add storm water management where none exists today. The existing facilities, including parking, will be used, and Petitioner will not be adding any additional traffic to the roadways. Tr. 69-70.

- (1) *The minimum area of the lot must be 2 acres if there are any on-site operations, including the parking or loading of trucks or equipment.*

Conclusion: The lot size is approximately 5.77 acres, well above the 2 acre minimum.

- (2) *Areas for parking and loading of trucks and equipment as well as other on site operations must be located a minimum of 50 feet from any property line. Adequate screening and buffering to protect adjoining uses from noise, dust, odors, and other objectionable effects of operations must be provided for such areas.*

Conclusion: Parking and loading areas for trucks and equipment, as well as other on-site operations for the landscape contractor use, are located more than 50 feet from all property lines. The evidence supports the conclusion that setbacks, topography, the existing trees, the proposed berm and the proposed additional landscaping are adequate to protect adjoining uses from noise, dust, odors and other objectionable effects of these operations, given that some amount of noise, dust and odors is inherent in the use.

- (3) *The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on site must be limited by the Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.*

Conclusion: Recommended Conditions in Part V of this report and the Statement of Operations (Exhibit 30(b)) specify the vehicles and equipment which may be on the subject property – 12 trucks, 3 sales vehicles, 9 trailers, 2 rubber tire loaders, and 2 skid loaders. Twelve parking spaces are provided for employee vehicles, and adequate facilities are provided for the parking of the trucks and equipment owned by the business, as demonstrated in the Schematic Parking Plan (Exhibit 21(h)). Technical Staff found that there is adequate parking for employee vehicles and equipment. Exhibit 24(a), p. 14. The Hearing Examiner so finds.

*(4) No sale of plant materials or garden supplies or equipment is permitted unless the contracting business is operated in conjunction with a retail or wholesale nursery or greenhouse.*

Conclusion: No retail activity will occur on the property, and therefore Petitioner will not sell plant materials, garden supplies, or equipment on site.

*(5) The Board may regulate hours of operation and other on-site operations so as to prevent adverse impact on adjoining uses.*

Conclusion: The Planning Board recommended and Petitioner agreed to the following hours of operation to prevent adverse impact on neighbors: Regular weekday hours of operation are limited to 6:00 A.M. to 6:00 P.M. for office workers and 7:00 A.M. to 6:00 P.M. for yard staff and landscape crews, except for snow removal operations which may occur as needed. Saturday hours are limited to 7:00 A.M. to 6:00 P.M. for office workers and 8:00 A.M. to 4:00 P.M. for yard staff and landscape crews. The Hearing Examiner recommends a condition restricting the hours as specified above.

*(6) In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessarily need to be controlled as stringently as the impact of a special exception in the residential zones.*

Conclusion: The proposed use is in a residential zone, not an agricultural zone, so it must be controlled stringently to avoid undue impacts of a special exception in the residential zones. For that reason, conditions have been recommended to limit the hours of operation and to reduce noise and other impacts on the neighbors.

## **D. General Development Standards**

### **Section 59-G-1.23. General development standards.**

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Zoning Ordinance §59-G-2.30.00 specifies some development standards, but others are dictated by the R-200 zone. The proposed use meets all those standards, as shown in the following table from the Technical Staff report (Exhibit 24(a), p. 6):

| Development Standard  | Min/Max Required                          | Provided   | Applicable Zoning Provision |
|---|---|--|-----------------------------|
| Maximum Building Height   | 50 feet                                   | 1 story  | § 59-C-1.327                |
| Minimum Lot Area  | 20,000 sq. ft.                            | 251,266.8 sq. ft.  | § 59-C-1.322(a)             |
| Minimum Lot Width at Front Building Line  | 100 ft.                                   | 282 ft.  | § 59-C-1.322(b)             |
| Minimum Lot Width at Street Line  | 25 ft.                                    | 282 ft.  | § 59-C-1.322(b)             |
| Minimum Setback from Street   | 40 ft.                                    | 61.4 ft.   | § 59-C-1.323(a)             |
| Minimum Side Yard Setback   | 12 ft. one side; sum of 25 ft. both sides | 55 ft north side; 50 ft. south side; 105 ft. sum of both | § 59-C-1.323(b)(1)          |
| Minimum Rear Yard Setback   | 30 ft.                                    | 95. ft.  | § 59-C-1.323(b)(2)          |
| Maximum Building Coverage   | 25 percent                                | 3.6 percent  | § 59-C-1.328                |
| Lot Area  | 2-acres                                   | 5.767-acres  | § 59-G-2.30.00(1)           |
| An accessory building or structure minimum set back from the street line  | 65 ft.                                    | 142.2 ft.  | § 59-C-1.326(3)(a)          |
| An accessory building or structure minimum set back from a rear lot line  | 7 ft.                                     | 95 ft.   | § 59-C-1.326(3)(b)          |
| An accessory building or structure minimum set back from a side lot line  | 12 ft.                                    | 50 ft.   | § 59-C-1.326(3)(c)          |
| Areas for parking and loading trucks and equipment as well as other on-site operations must be located a minimum of 50-feet from any property line. | 50 ft. (all sides)                        | Rear: 96 ft.<br>Remaining sides: 50 ft.                  | § 59-G-2.30.00(2)           |
| Setback for Special Exception Parking Facilities of $\geq 3$ cars   | 24 ft.                                    | 50 ft.   | § 59-E-2.83(b)              |

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As discussed in Part II.B.5.b. of this report, parking provided on the site will be adequate to meet the requirements of Article 59-E, and as discussed in Part II.B.5.c. of this report, parking facilities will meet the requirements of Article 59-E, except where waivers have been requested. Technical Staff and the Hearing Examiner recommend granting the waivers that have been requested for the reasons discussed at length in the referenced section of this report.

*(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

\* \* \*

Conclusion: This section is not applicable, and in any event, the property meets the zone's frontage requirements.

*(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: According to Technical Staff, the property is exempt from submitting a forest conservation plan (Exhibits 23(c) and 24(a), p. 13).

*(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: As discussed in Part II. C. of this report, this site is partially in a special protection area (SPA), and as a result, a water quality plan is required. Zoning Ordinance §59-G-1.23(e). Petitioner submitted the required Preliminary/Final Water Quality Plan (Exhibits 21(o) and (p)), and the Montgomery County Department of Permitting Services (DPS) conditionally approved it by letter dated September 1, 2011 (Exhibit 27). On October 20, 2011, the Planning Board approved the Preliminary/Final Water Quality Plan, subject to the conditions imposed by DPS (Exhibit 31(a)). The Hearing Examiner included a condition recommending that Petitioner be required to comply with the approved Preliminary/Final Water Quality Plan (Exhibits 21(o) and (p)), in Part V of this report.

*(f) Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, the only sign proposed for the facility is the existing entrance sign depicted on pages 16-17 of this report. The existing sign is not illuminated, but given its length and width (about 6 feet long and 4½ feet wide, for a total of about 28 square feet), it significantly exceeds the size of a sign permitted in a residential Zone (2 square feet) under Zoning Ordinance §59-F-4.2(a). Therefore, Petitioner must obtain a sign variance if the existing sign is to be retained, which Petitioner indicated it intends to do. Tr. 122-123.

Petitioner's civil engineer, Curt Schreffler, testified that the existing entrance sign is unlighted and is located on a busy State highway, just south of a shopping center that has very large and ample signage. The subject site is just outside of the town limits of Laytonsville, which has several commercial properties, and across the street from another landscape facility, so in his opinion, the existing sign is very much in character with other signs along this State highway. Tr. 124.

A similar conclusion was reached by Petitioner's land planner, William R. Landfair, in an affidavit. Exhibit 30(c).

Given the commercial nature of much of the surroundings; the fact that the sign is located on a major road; that it is identifying a large business permitted in the Zone by the Zoning Ordinance; and that there is no evidence in this record to contradict the testimony of Petitioner's civil engineer and its land planner that this unlighted sign is compatible with its surroundings, the Hearing Examiner so finds. The following condition is recommended in Part V of this report:

The existing sign must be removed unless a sign variance is granted or the Petitioner brings the sign into compliance with the requirements of the Zoning Ordinance. If a sign variance is obtained, the Board approves the existing, freestanding, non-illuminated sign, as depicted on the Landscape and Lighting Plan (Exhibit 21(b)). Petitioner must file a copy of its sign permit with the Board of Appeals.

*(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The subject site is in a residential zone, but no new buildings are proposed as part of the special exception. A metal garage within the minimum setback will be removed. The existing property is well screened and the landscaping will be supplemented by additional plantings. Technical Staff found that the existing structures are of appropriate bulk and height (Exhibit 24(a), p. 13.), and Mr. Landfair testified that these structures have an appearance that is consistent with secondary and accessory structures that are often found both in single-family residential and agricultural zones. Tr. 62-63. There being no contrary evidence, Hearing Examiner so finds.

*(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

*(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

*(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Petitioner is proposing to use two different light fixtures, as discussed in Part II. B.

2. of this report. Two 150 watt high pressure sodium beams will be placed on the metal maintenance storage building, and two 70 watt high pressure sodium beams will be placed on the metal shed and wooden storage shed. These lights will be shielded with cut off fixtures to minimize light diffusion. Technical Staff reports that light levels at all boundaries of the property will not exceed 0.1 foot candles. Exhibit 24(a), p. 14. Based on this record, the Hearing Examiner finds that the requirements of this provision have been met.

Based on the testimony and evidence of record, I conclude that, with the recommended conditions, the use proposed by Petitioner meets the specific and general requirements for a landscape contractor special exception, and that the Petition should be granted, with the conditions recommended in the final section of this report.

## **V. RECOMMENDATIONS**

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2807, which seeks a special exception to operate a landscape contractor business at 6720 Olney-Laytonsville Road (Maryland Route 108), Laytonsville, Maryland, and for a waiver of the parking standards of Chapter 59-E of the Zoning Ordinance to allow parking as configured on the Schematic Parking Plan (Exhibit 21(h)), be *granted* with the following conditions:



1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. A maximum of twenty-five (25) employees are permitted on site at any one time.
3. Regular weekday hours of operation are limited to 6:00 A.M. to 6:00 P.M. for office workers and 7:00 A.M. to 6:00 P.M. for yard staff and landscape crews, except for snow removal operations which may occur as needed. Saturday hours are limited to 7:00 A.M. to 6:00 P.M. for office workers and 8:00 A.M. to 4:00 P.M. for yard staff and landscape crews. Customers are not permitted on-site.
4. Vehicles are limited to a total of twelve (12) work trucks, three (3) sales vehicles, nine (9) trailers, two (2) rubber tire loaders, and two (2) skid loaders. All vehicles, when not in use, must be parked in the designated parking areas, as indicated by the provided site plan. On-site parking is limited to a total of twelve (12) employee parking spaces, which includes one handicapped parking space.
5. All deliveries and pick-ups must occur between 8 A.M. and 4 P.M., Monday through Friday.
6. A corner of the existing office must be removed, an existing metal garage must be removed, and corners of the employee gravel parking lot must be removed to come into compliance with the 50-foot setback requirements. All on-site landscape activities, including storage, parking, and related outdoor operations, are restricted to within the 50-foot Building Restriction Line (BRL) identified on the Site and Landscape Plan. No manufacturing for mulch or compost, or selling of plants will take place on-site.
7. No materials classified as hazardous waste may be stored on the property, and no pesticides, manure, or chemicals may be stored on site at any time with the exception of fertilizer and 'Ice Melt,' which must be stored in bags, within a building and off the ground.
8. Tree chippers or splitters must not be used on-site.
9. There must be no outdoor lighting, except that which exists in the vicinity of the residence, office building, and storage building.
10. The existing sign must be removed unless a sign variance is granted or the Petitioner brings the sign into compliance with the requirements of the Zoning Ordinance. If a sign variance is obtained, the Board approves the existing, freestanding, non-illuminated sign, as depicted on the Landscape and Lighting Plan (Exhibit 21(b)). Petitioner must file a copy of its sign permit with the Board of Appeals.
11. Gravel parking spaces must be designated by wheel stops.
12. Trucks must be loaded and reversed in place in the afternoon to pull forward in the morning without backup beepers.

13. Petitioner must comply with the terms of its Statement of Operations (Exhibit 30(b)), but the conditions specified in the Board's Resolution control in the event of any conflict.
14. Petitioner is granted a waiver of the parking standards of Chapter 59-E of the Zoning Ordinance to the extent necessary to allow parking spaces on site to be configured as on the Schematic Parking Plan (Exhibit 21(h)). The waivers apply to Zoning Ordinance §§59- E- 2.21 (arrangement and marking), 2.4 (access and circulation), 2.41 (driveways), 2.42 (walkways), 2.43 (separation of parking spaces), 2.6 (lighting), 2.7 (landscaping) and 2.83 (shading of parking area).
15. Petitioner must comply with the terms of the Preliminary/Final Water Quality Plan (Exhibits 21(o) and (p)), approved by DPS on September 1, 2011 (Exhibit 27) and the Planning Board on October 20, 2011 (Exhibit 31(a)), as conditioned therein.<sup>8</sup>
16. The storage of fuel is permitted in the existing fuel station area identified on the site plan, but it must be stored and maintained in accordance with all applicable federal, state and local regulations.
17. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: November 10, 2011

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner

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<sup>8</sup> The Hearing Examiner notes that the Planning Board voted to approve the Preliminary/ Final Water Quality Plan on October 20, 2011, as indicated in Exhibits 31 and 31(a), but the final version of the Planning Board's resolution is dated October 28, 2011, the date it was mailed out (Exhibit 32). Because the record had already closed on October 20, 2011, that final version is not included in the hearing record, although a copy is retained in the file as Exhibit 32. The Hearing Examiner found the evidence of Planning Board approval submitted on October 20, 2011, to be sufficient.